NO. 85-1337

Supreme Court, U.S.
FILED
FEB 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIAM HARBISON, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

WHETHER A TACTICAL DECISION MADE BY COUNSEL FOR A CRIMINAL DEFENDANT TO ADMIT, DURING JURY ARGUMENT, HIS CLIENTS GUILT OF A LESSER-INCLUDED OFFENSE BUT SEEK ACQUITTAL OF THE OFFENSE CHARGED, CONSTITUTES A *PER SE* VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	*i*
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT HOLDING THAT COUNSEL'S JURY ARGUMENT CONSTITUTED A *PER SE* VIOLATION OF HARBISON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WITHOUT INQUIRING WHETHER HARBISON WAS PREJUDICED, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), AND *UNITED STATES* V. *CRONIC*, 466 U.S. 648 (1984) 10

II. THE NORTH CAROLINA SUPREME COURT'S DECISION ALSO IS IN CONFLICT WITH OTHER DECISIONS OF THE STATE AND FEDERAL COURTS WHICH HAVE NOT APPLIED THE PRESUMPTION OF PREJUDICE UNDER SUCH CIRCUMSTANCES 16

Page

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Page

Boykin v. *Alabama*, 395 U.S. 238 (1969) 14

Commonwealth v. *Lane*, 476 Pa. 258, 382 A.2d 460 (1978) 18

Francis v. *Spraggins*, 720 F.2d 1190 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1776 (1985) 18

King v. *Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2020 (1985) 17

McNeal v. *State*, 409 S.E.2d 528 (Fla. Dist. Ct. App. 1982) 17

McNeal v. *Wainwright*, 772 F.2d 674 (11th Cr. 1984) 14,16

Meadows v. *Commonwealth*, 550 S.E.2d 511 (Ky. 1977) 14,15

State v. *Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977) 5

Strickland v. *Washington*, 466 U.S. 668 (1984) 10,11,12,13,14

United States v. *Cronic*, 466 U.S. 648 (1984) 10,11,12,13

Page

Wiley v. *Sowders*, 647 F.2d 642 (6th Cir.), *cert denied*, 454 U.S. 1091 (1981) 14,16,18

Young v. *Zant*, 677 F.2d 792 (11th Cir. 1982) 18

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, U.S. Constitution 2,11,15,18

Amendment XIV, U.S. Constitution 2

STATUTES INVOLVED

28 U.S.C. §1257 2

N.C.G.S. §15A-1411 5

N.C.G.S. §15A-1415 5

MISCELLANEOUS

Rule 17.1, Rules of the Supreme Court of the United States 2

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PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of North Carolina prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court, entered on December 10, 1985, which reversed Respondent Harbison's convictions and granted him a new trial.[1]

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[1] The parties to this proceeding are the Petitioner, State of North Carolina, hereinafter referred to as "State," and Respondent, William Harbison, Jr., hereinafter referred to as "Harbison."

OPINIONS BELOW

The Opinion of the Supreme Court of North Carolina is published at _____ N.C. _____, 337 S.E.2d 504 (1985). A copy is included in the Appendix to this Petition. (Appendix A at A-1.)

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 10, 1985. The jurisdiction of this court to review that judgment is invoked pursuant to 28 U.S.C. §1257 and Rule 17.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution.

U.S. Const. Amend. VI provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, §1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent William Harbison, Jr. was indicted in June 1976 for the first-degree murder of Morris Garfield Hardy and for assault with a deadly weapon, with intent to kill, inflicting serious bodily injury upon Dannah Yvonne Franklin. (Appendix B at A-8.)

The trial was held at the August 30, 1976 Criminal Session of Burke County Superior Court. Harbison was represented by Mr. John McMurray, appointed from the local bar, and Mr. James Fuller of Charlotte, North Carolina, who had been retained by Harbison's family just prior to the trial date.[2]

In brief, the State's evidence showed that Harbison was Dannah Franklin's boyfriend. On the night of April 24, 1976 Ms. Franklin was driving her car with Morris Hardy sitting in the front passenger seat. Harbison spotted them, pursued Ms. Franklin's vehicle for several miles, and finally succeeded in pulling his car in front of hers on a side road. Harbison jumped out of his car, gun in hand, and pointed the gun at the window. As Ms. Franklin attempted to drive around Harbison he fired two shots at the left front tire. It is undisputed that Harbison then fired

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[2] The Superior Court denied Harbison's motion for postponement. Mr. McMurray therefore remained in the case as co-counsel. (Appendix J at A-50.)

three shots through the window of the left front door at extremely close range. Ms. Franklin was hit in the side of her head. The shot that killed Morris Hardy, who was sitting in the right front passenger's seat, entered Hardy's back and travelled forward lodging in his right breast. Harbison's proffered explanation for these three shots was that he fired in a panic. However, the evidence showed he was a trained law enforcement officer with military experience and that his pistol had an abnormally heavy trigger pull.

Harbison testified that after the shooting he left the scene, but then came back. After finding Ms. Franklin wounded, but alive, he checked Hardy. Hardy was bleeding and moaning. Nevertheless, Harbison left him and took Ms. Franklin to the hospital. While en route he said that he did not mean to do it. He pleaded with Ms. Franklin not to tell anyone he had done it. He said, "Don't tell my daddy. Tell him someone else did it, I got too much going for me. Don't tell them I did it." Later he said that he had to "get rid of the gun." He threw the five spent shell casings out of the car on Interstate Highway 40. When he arrived at the hospital he hid the gun in some bushes. Upon questioning by police he initially denied any involvement in the shooting. However, he subsequently changed his statement explaining that he had needed time to "get his head straight."

Harbison contended that he acted in self-defense and had fired the shots only in an attempt to stop the car. Although Harbison attempted to introduce the left front tire of Ms. Franklin's car in order to corroborate his testimony, the trial court refused to admit it for failure to establish the proper chain of custody.

Both Mr. Fuller and Mr. McMurray made closing arguments for Harbison. However, no transcript of those arguments was made.

After deliberating for several hours the jury returned its verdicts finding Harbison guilty of *second-degree* murder and assault with a deadly weapon inflicting serious bodily injury.

On September 4, 1976 the trial judge sentenced Harbison to a term of life imprisonment on the second degree murder conviction and to a term of ten year's imprisonment on the assault conviction. (Appendix C at A-11 and D at A-12.)

Harbison appealed to the North Carolina Supreme Court. He did not raise the issue of effective assistance of counsel in that appeal. He continued to be represented by Mr. McMurray and Mr. Fuller. On November 11, 1977 the North Carolina Supreme Court rendered its decision affirming the convictions, finding no error in Harbison's trial. *State* v. *Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977). (Appendix E at A-13.)

Thereafter, Harbison sought relief in the United States District Court for the Western District of North Carolina by way of a petition for a writ of habeas corpus. He again failed to raise the effective assistance of counsel claim. On December 9, 1983 the District Court entered its order denying the petition. *Harbison* v. *North Carolina*, No. A-C-83-225 (W.D.N.C. Dec. 9, 1983). Appendix F at A-27.)

On May 3, 1984, seven years and seven months following the convictions, Harbison filed a Motion for Appropriate Relief pursuant to N.C.G.S. §15A-1411[3] and N.C.G.S. §15A-1415[4] alleging, for the first time, that he was denied effective assistance of counsel at his trial. (Appendix G at A-42.) In that motion Harbison alleged that his court-appointed attorney, Mr. John McMurray, made the following statement during closing arguments:

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[3] *See* Appendix H at A-47.

[4] *See* Appendix I at A-48.

> Ladies and gentlemen of the jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

(Appendix G at A-44-45.)

Since no transcript of the actual argument was made, it was Harbison's memory which formed the basis for his motion, together with a statement from his other trial counsel, Mr. James Fuller, which had been given in response to Harbison's interrogatories. The interrogatories requested Mr. Fuller's opinion as to whether Mr. McMurray had offered Harbison effective assistance of counsel. Mr. Fuller replied,

> This question is impossible to answer directly because it calls for factual and legal conclusions. In past conversations with Mr. Harbison, he has expressed concern about two primary areas. In hopes of answering the spirit of this question, I will address those two areas.
>
> First, as trial approached, it became apparent that there had not been a physical inspection of the shooting site or a physical inspection of the death vehicle's damaged tire that would later be the subject of several appeals. With our investigator Les Burns, I checked both. I never discussed the question with Mr. McMurray and, therefore, have no idea about his reason for not conducting the inspections or whether he thought such was unnecessary.

> In my opinion, the tire offered the only evidence supporting a defense that could lead to acquittal. The scene was less important since there were numerous sketches and photos.
>
> The second question arose during closing argument. Going first for the defense, I argued for acquittal based on our theory of self-defense, suggesting that the car had sped at Mr. Harbison, that he had fired first to stop the speeding vehicle, and that the last several rounds were fired in a panic as the car sped past. While the argument is theoretically sound, and supported by the holes in the tire, it would be a difficult argument to sale [sic] to the jury under any conditions. Mr. McMurray followed. During his argument, I was quite surprised to hear him suggest to the jury that Mr. Harbison should be convicted of manslaughter. He asked the jury to choose between two "extreme views," that advanced by me and by the District Attorney. During his argument Mr. Harbison became visibly upset. He asked the investigator and me several times in whispered tones if Mr. McMurray was on his side or the State's. Later, I indirectly expressed my surprise to Mr. McMurray. He responded that he knew personally a number of the jurors and believed there was no reasonable possibility of their returning a verdict of acquittal. Therefore, he tried to give them a middle ground that would be less painful to Mr. Harbison than a conviction for murder. To my knowledge, Mr. Harbison never consented to such an argument.

(Appendix J at A-50-51.)

Superior Court Judge Claude S. Sitton considered the motion, but he did not hold an evidentiary hearing. In an

Order entered on June 12, 1984, Judge Sitton denied the motion, stating:

> This Court finds and concludes as a matter of law that the Defendant has not been deprived of proper legal representation. The Appellate Courts have previously held that the standard of effective representation of counsel is not the same as errorless representation. The fact that the defense may not have been the best is not within itself grounds for relief.
>
> This Court further finds that the personal comments and opinions expressed by counsel were not proper, but further finds that the statements were not and do not constitute prejudicial error.

(Appendix K at A-54.)

Defendant then filed a Petition for Writ of Certiorari in the North Carolina Supreme Court. On November 6, 1984 that Court granted the Petition, with review limited "to whether trial counsel's argument to the jury constituted prejudicial error." (Appendix L at A-56.)

During the pendency of the appeal, the North Carolina State Bar held a disciplinary proceeding against Mr. John McMurray upon a complaint filed by Harbison. Testimony was taken from Harbison, Mr. Fuller, Mr. McMurray, the trial judge and the jury foreman. The evidence was conflicting as to the actual argument made by Mr. McMurray. Mr. McMurray testified that he knew several of the jurors and became convinced that the self-defense plea would not be accepted. He then testified that:

> I concluded that you had to say something to the

> jury in some way to get them to consider a lesser included offense. I didn't argue that he was convicted — that he should be convicted of anything. The import comes through that way. My argument — the thrust of my argument was that he should not be convicted of felony murder or first degree murder or second degree murder.

(Appendix M at A-78.)

He also testified that:

> [A]t some point in the argument I said, You're going to find him guilty — or you may find him guilty of some criminal offense. I cannot quote my words precisely. You may find him guilty of some criminal offense; you will find him guilty of some criminal offense, but you should not find him guilty of any offense greater than manslaughter.

(Appendix M at A-80.)

Mr. McMurray specifically denied making the statement attributed to him by Harbison. (Appendix M at A-94-95.) The jury foreman testified that Mr. McMurray's argument persuaded him to vote for second-degree rather than first-degree murder as he originally intended. (Appendix N at A-115-116.)

Several experienced attorneys and trial judges, including the late Senator Sam Ervin and the Attorney General of North Carolina, testified as expert witnesses for Mr. McMurray, stating their opinions that Mr. McMurray's argument was a valid trial tactic.

After hearing the evidence, the State Bar dismissed the

case on the basis that it was unable to determine what argument had actually been made. (Appendix O at A-119.)

The State subsequently filed a motion in Harbison's appeal asking the North Carolina Supreme Court to remand the case to the Superior Court for an evidentiary hearing, or in the alternative, to accept the record of the State Bar proceedings in diminution of the record on appeal. (Appendix O at 123.) However, the court denied that motion. (Appendix Q.)

After reviewing briefs from Harbison and the State and after hearing oral arguments, the North Carolina Supreme Court entered its opinion holding that Harbison was denied the effective assistance of counsel guaranteed by the Sixth Amendment. Specifically, the court held that Counsel's argument constituted a *per se* violation of the Sixth Amendment without the need for any showing of prejudice. (Appendix A at A-6.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT HOLDING THAT COUNSEL'S JURY ARGUMENT CONSTITUTED A *PER SE* VIOLATION OF HARBISON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WITHOUT INQUIRING WHETHER HARBISON WAS PREJUDICED, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), AND *UNITED STATES* V. *CRONIC* 466 U.S. 648 (1984).

This Court's review of the decision of the North Carolina Supreme Court is warranted first and foremost because that decision is in significant conflict with two recent

landmark Sixth Amendment cases decided by this Court.

In the companion cases of *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), this Court expressly distinguished between the standards of appellate review to be applied under the Sixth Amendment to cases involving the "actual or constructive denial of the assistance of counsel" and those involving "actual ineffectiveness" claims alleging a deficiency in attorney performance. *Strickland*, 446 U.S. at _____, 104 S.Ct. at 2067. Prejudice may be presumed in the former category, but must be established by defendant in the latter. *Id.* Here, the surrounding circumstances of Mr. McMurray's mitigating argument to the jury about Harbison's guilt of a lesser included offense simply do not justify a presumption of ineffectiveness. *Cronic*, 466 U.S. at _____, 104 S.Ct. at 2048. Therefore, the North Carolina Supreme Court should have evaluated the alleged error by Mr. McMurray under the *Strickland* standard rather than finding a *per se* Sixth Amendment violation.

The opinions in *Strickland* and *Cronic* recognized that there are significant policy considerations mandating the application of different standards of review for the two types of cases. The "actual or constructive denial" cases include those where a defendant has been denied the assistance of counsel at a critical stage of the criminal proceedings[5] or where the State affirmatively interferes with the representation process.[6] As this Court explained:

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[5] *E.g.*, *Geders* v. *United States*, 425 U.S. 80 (1975) (counsel not allowed to consult with defendant during overnight recess); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (denial of counsel at arraignment); *William* v. *Kiser*, 323 U.S. 471 (1945) (denial of counsel at trial).

[6] *E.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974) (counsel prohibited from cross-examining prosecution witness about juvenile criminal record); *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) (state statute required defendant to testify as his first witness).

> prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. [*United States* v. *Cronic*, 466 U.S. at ——, 104 S.Ct. at 2047]. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland, 466 U.S. at ——, 104 S.Ct. at 2067.[7]

However, apart from circumstances of the magnitude identified above, this Court has noted there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. *Cronic*, 466 U.S. at ——, 104 S.Ct. at 2046. In *Strickland* and *Cronic* this Court expressly refused to extend the presumption of prejudice to cases involving allegations of attorney error in the so-called "actual ineffectiveness" cases. In such cases, the government is not responsible for, and hence not able to prevent, attorney errors that may result in reversal of a conviction or sentence. *Strickland*, 466 U.S. at ——, 104 S.Ct. at 2067. Since a presumption of prejudice would not serve to deter the State from any unconstitutional course of action, the sole effect of the presumption would be to "bestow a windfall upon criminal defendants who were not harmed by the errors of their

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[7]One other type of case has been accorded a more limited presumption of prejudice, *i.e.*, those involving counsel burdened by an actual conflict of interest. *See Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). As Justice O'Conner pointed out in *Strickland*, the difficulty of measuring the effect on defense counsel's representation in such cases together with the ability of the trial courts to make early inquiry in situations likely to give rise to conflicts, make it reasonable to impose a more rigid rule in such cases. However, even here, prejudice is only presumed if the defendant shows that there was an actual conflict *and* that the conflict adversely affected the lawyer's performance.

attorneys." *Washington* v. *Strickland*, 693 F.2d 1243, 1260 (5th Cir. 1982).

The requirement mandated by *Strickland* and *Cronic* that a defendant show not only attorney error but also prejudice negates the possibility of such a windfall. More importantly, it serves to ensure that the purpose underlying the Sixth Amendment's requirement of assistance of counsel, *i.e.*, a fair trial, is preserved by allowing the reviewing court to assess the surrounding circumstances and determine:

> whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 466 U.S. at ——, 104 S.Ct. at 2064.

In the case at bar trial counsel's decision to argue for a lesser-included offense was based on his assessment of the jury's reaction to Harbison's self-defense theory. counsel had put the State's proof to the test in an adversarial context. However, the evidence was overwhelming and, as the North Carolina Supreme Court stated in its first opinion (Appendix E at A-27), would have supported conviction of murder in the first degree. Even Mr. Fuller, Harbison's retained co-counsel, admitted that his self-defense theory and argument were not likely to convince the jury "under any conditions." (Appendix J at A-51). The one piece of evidence which could have supported the self-defense theory (the tire) had not been admitted into evidence. It was only in the light of these facts that Mr. McMurray made an informed tactical decision to argue for manslaughter. However, by refusing to consider the circumstances surrounding that decision and by holding that Harbison need not show prejudice, the North Carolina Supreme Court ignored this Court's observation in

Strickland that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at ——, 104 S.Ct. at 2066, and failed to require that Harbison overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional competence." *Id.*[8]

The North Carolina Supreme Court's presumption of prejudice is premised solely on the assumption that an attorney's jury argument admitting his client's guilt without first obtaining the client's consent is the functional equivalent of a guilty plea entered without the client's consent. (Appendix A at A-6). However, as this Court noted in *Boykin* v. *Alabama*, 395 U.S. 238 (1969):

> A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced.

Id. at 242 n.4. Unlike a guilty plea, here the State's case was put to the test in an adversarial context, and only thereafter did counsel make the calculated tactical decision to argue for conviction of a lesser offense than the crime

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[8] Many courts, state and federal, have recognized the validity of this tactic in the face of overwhelming evidence. *See, e.g., United States* v. *Liefried*, 732 F.2d 388 (4th Cir. 1984); *McNeal* v. *Wainwright*, 722 F.2d 674 (11th Cir. 1984); *United States* v. *Trapnell*, 638 F.2d 1016 (7th Cir. 1980); *People* v. *Wise*, 351 N.W.2d 255 (Mich. App. 1984); *Commonwealth* v. *Stoute*, 413 N.E.2d 739 (Mass. App. 1980); *Meadows* v. *Commonwealth*, 550 S.W.2d 511 (Ky. 1977); *People* v. *Gary*, 49 Ill.App.3d 704, 364 N.E.2d 726 (1977).

These cases have distinguished the holding of cases like *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981), *and People* v. *Carter*, 41 Ill.App.3d 425, 354 N.E.2d 482 (1976), relied on by the North Carolina Supreme Court, where counsel admitted guilt to the maximum offense charged, thereby completely failing to preserve the adversarial process.

charged. "The action of trial counsel ... may have amounted to a tactical retreat, but certainly it did not surrender the cause." *Meadows* v. *Commonwealth*, 550 S.W.2d 511, 512 (Ky. 1977). Despite Mr. McMurray's mitigating argument, the jury still was required to put the State to its burden of proving Harbison guilty of any crime. Moreover, Mr. McMurray and Mr. Fuller were effective adversaries of the State's case. Therefore, the North Carolina Supreme Court's fallible premise that the argument "swept away" Harbison's right to "a fair trial and to put the State to its burden of proof" does not constitute a "surrounding circumstance" justifying a presumption of ineffectiveness.

Further, the North Carolina Supreme Court not only failed to apply the standards of review mandated by this Court, but it also carved out a new category to be added to the list involving a *per se* violation of the Sixth Amendment. In so doing it has blurred the distinctions so carefully drawn by this Court on the basis of sound policy considerations.

If the North Carolina Supreme Court's decision remains uncorrected any attorney error may now be fair game for inclusion in the limited category of *per se* violations as the lower courts use the Sixth Amendment to second-guess, on a case by case basis, those tactical decisions of defense counsel which appear unwise, regardless of whether the defendant was actually prejudiced. Such a situation creates an intolerable burden for the trial courts and the State since defense counsel are in sole control of the creation or prevention of such errors. The requirement that actual prejudice be shown is the only effective way to ensure that both the defendant and the State receive a fair trial.

II. THE NORTH CAROLINA SUPREME COURT'S DECISION ALSO IS IN CONFLICT WITH OTHER DECISIONS OF THE STATE AND FEDERAL COURTS WHICH HAVE NOT APPLIED THE PRESUMPTION OF PREJUDICE UNDER SUCH CIRCUMSTANCES.

The North Carolina Supreme Court's decision also is in conflict with a number of federal and state court decisions, in particular *McNeal* v. *Wainwright*, 722 F.2d 674 (11th Cir. 1984).

In *McNeal*, defense counsel made a closing argument, similar to the one at issue herein, which suggested that defendant McNeal was guilty of manslaughter and not first-degree murder. McNeal contended that he was denied the effective assistance of counsel because this argument amounted to an admission of guilt by counsel, without his prior knowledge or consent. On appeal of the federal district court's refusal to grant habeas corpus relief, the United States Court of Appeals for the Eleventh Circuit held that defense counsel's arguments to the jury concerning manslaughter "were tactical and strategic," and thus "the strategy of the trial counsel was proper and would not amount to a constitutional violation." *Id.* at 676. The Eleventh Circuit panel also rejected McNeal's argument that defense counsel's statements amounted to a guilty plea entered without consent, distinguishing *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981), as a case in which the defense counsel repeatedly stated his clients were guilty of the offenses charged rather than a lesser offense. *Id.* at 676-77. The Eleventh Circuit observed that "[a]n attorney's strategy may bind his client even when made without consultation." *Id.* at 677. It also cited with approval the Florida Supreme Court's commentary:

> When faced with the duty of attempting to avoid the consequences of overwhelming evidence of

> the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position. To be effectual, trial counsel should be able to do this *without express approval of his client* and without risk of being branded as being professionally ineffective because others may have different judgment or less experience.

McNeal v. *State*, 409 S.E.2d 528, 529 (Fla. Dist. Ct. App. 1982) (emphasis added; citations and footnote omitted).

Here, although Mr. McMurray made an argument similar to the "at best" argument in *McNeal*, the North Carolina Supreme Court held he had admitted his client's guilt without first obtaining consent and, therefore, there was a *per se* violation of the Sixth Amendment without any need for inquiry as to whether Harbison had been prejudiced by the remarks. These holdings are in direct and significant conflict with each other on an important question of federal law, and this conflict should be settled by this Court.

Likewise, the North Carolina Supreme Court's decision is even in conflict with decisions of other federal and state courts that have found constitutional violations in similar instances of defense counsel's jury arguments. All of these cases, either expressly or implicitly, analyze whether the defendants were prejudiced by the arguments, rather than presuming prejudice as the North Carolina Supreme Court did in its decision. *Cf., e.g., King* v. *Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, _____ U.S. _____,

105 S.Ct. 2020 (1985); *Francis* v. *Spraggins*, 720 F.2d 1190 (11th Cir. 1983), *cert denied*, _____ U.S. _____, 105 S.Ct. 1776 (1985); *Young* v. *Zant*, 667 F.2d 792 (11th Cir. 1982); *Wiley* v. *Sowders, supra; Commonwealth* v. *Lane*, 476 Pa. 258, 382 A.2d 460 (1978). In fact, the North Carolina Supreme Court's decision apparently is the first to hold that such an argument is a *per se* violation of the Sixth Amendment right to effective assistance of counsel. Again, review by this Court is warranted to resolve this conflict as to the proper analysis for such asserted errors in defense counsel's jury argument.

CONCLUSION

The North Carolina Supreme Court's decision is a dangerous and unprecedented pronouncement on an important issue of federal constitutional law which this Court should and, ultimately, must settle. Indeed, the state court announced the rule that under the Sixth Amendment to the United States Constitution, it is *per se* ineffective assistance of counsel "in *every* criminal case" in which defense counsel admits the defendant's guilt to the jury without the defendant's consent. The court reasoned that in such cases "the harm is so likely and so apparent that the issue of prejudice need not be addressed." (Appendix A at A-5.)

This case *squarely* presents the issue whether such a presumption of prejudice is justified without inquiry into counsel's actual performance at trial. The issue is relatively straightforward — whether a tactical decision by an attorney to argue to the jury that his client is guilty of only a lesser included offense constitutes a *per se* violation of the Sixth Amendment, or whether the defendant must affirmatively prove prejudice to make out such a violation. Resolution of this issue is needed inasmuch as this tactic by defense attorneys is commonplace in the trial of criminal cases, and this decision, if undisturbed, may give rise to numerous other *per se* ineffectiveness challenges

even though counsel's action clearly inured to the benefit of his client. It is also important to resolve this issue so that defense attorneys will not be tempted to "sandbag" a case with error when it appears conviction is likely. In such cases, the State stands virtually helpless to prevent the interjection of the error into the trial. Under the North Carolina Supreme Court's decision, a defense attorney need only make reference in his jury argument to his client's guilt of a lesser included offense, and his client will be awarded a new trial on appeal. Our system of justice cannot tolerate such an undermining of the finality of criminal trials.

Because the North Carolina Supreme Court's decision on this important and recurring issue of federal law is in conflict with the recent decisions of this Court, with the decisions of the federal circuit courts of appeal which have ruled on the issue, and with a substantial number of state appellate courts, the State respectfully prays that a Writ of Certiorari should issue to review the judgment of the North Carolina Supreme Court herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT by depositing same in the United States mail at Raleigh, North Carolina, first class postage prepaid, to:

Mr. Louis D. Bilinois
Box 1070
Raleigh, North Carolina 27602

This the 8th day of February, 1986.

Barry S. McNeill
Assistant Attorney General
Attorney for Petitioner

85-1337

Supreme Court, U.S.
FILED
FEB 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIAM HARBISON, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

APPENDIX

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144

TABLE OF CONTENTS

APPENDICES

		Page
A.	OPINION OF THE NORTH CAROLINA SUPREME COURT, *State* v. *Harbison*, ____ N.C. ____, 337 S.E.2d 504 (1983)	A 1
B.	INDICTMENTS	A 8
C.	JUDGMENT AND COMMITMENT-SECOND DEGREE MURDER	A 11
D.	JUDGMENT AND COMMITMENT-ASSAULT WITH A DEADLY WEAPON INFLICTING SERIOUS BODILY INJURY	A 12
E.	OPINION, *State* v. *Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977)	A 13
F.	JUDGMENT DENYING PETITION FOR WRIT OF HABEAS CORPUS, *Harbison* v. *State*, A-C-83-225 (W.D.N.C. Dec. 12, 1983)	A 29
G	MOTION FOR APPROPRIATE RELIEF	A 42
H.	N.C.G.S. § 15A-1411	A 47
I.	N.C.G.S. § 15A-1415	A 48
J.	ANSWER TO INTERROGATORIES	A 50
K.	ORDER DENYING MOTION FOR APPROPRIATE RELIEF	A 54
L.	ORDER ALLOWING PETITION FOR WRIT OF CERTIORARI	A 56
M.	TESTIMONY OF JOHN H. McMURRAY BEFORE DISCIPLINARY HEARING COMMISSION OF THE N.C. STATE BAR	A 57

Page

N. TESTIMONY OF LESLIE FARFOUR (JURY FOREMAN) BEFORE DISCIPLINARY HEARING COMMISSION OF THE N.C. STATE BAR A-112

O. ORDER OF THE DISCIPLINARY HEARING COMMISSION OF THE N.C. STATE BAR A-123

P. MOTION IN DIMINUTION OF THE RECORD ON APPEAL OR TO REMAND FOR AN EVIDENTIARY HEARING A-132

Q. ORDER DENYING MOTION IN DIMINUTION OF THE RECORD ON APPEAL OR TO REMAND FOR AN EVIDENTIARY HEARING..... A-139

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 400PA84-Burke
[Filed: 1985 December 10]

STATE OF NORTH CAROLINA

v.

WILLIAM HARBISON, JR.

Appeal by the defendant from the order of Judge Claude S. Sitton, entered June 12, 1984, in the Superior Court, Burke County.

The defendant was convicted of second degree murder and assault with a deadly weapon inflicting serious bodily injury. He received a life sentence for the second degree murder conviction and a ten year sentence for the assault conviction. The defendant appealed the murder conviction to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a). The Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the assault case. The Supreme Court found no error. *State v. Harbison,* 293 N.C. 474, 238 S.E.2d 449 (1977).

On May 3, 1984, the defendant filed a motion for appropriate relief in the Superior Court, Burke County, alleging that he was denied effective assistance of counsel at his 1977 trial. On June 12, 1984, Judge Sitton denied the defendant's motion. On November 6, 1984, the Supreme Court allowed the defendant's petition for writ of certiorari to review the Superior Court's denial of his motion. Heard in the Supreme Court October 16, 1985.

Lacy H. Thornburg, Attorney General, by *Lucien*

Capone III, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by *Malcolm Ray Hunter, Jr.,* First Assistant Appellate Defender, for the defendant-appellant.

Mitchell, Justice.

The defendant assigns as error the trial court's denial of his motion for appropriate relief. He contends that during the closing arguments to the jury during his 1977 trial, his court appointed counsel admitted his guilt without his consent. He argues that this was ineffective assistance of counsel and violated his constitutional right to enter a plea of not guilty. We conclude that the court appointed counsel's admission of the defendant's guilt during the closing arguments to the jury is per se prejudicial error. The defendant is entitled to a new trial.

A complete review of the evidence presented at trial is found in the opinion of this Court on the defendant's prior appeal. 293 N.C. 474, 238 S.E.2d 449 (1977). The State's evidence tended to show that the defendant, William Harbison, Jr., and the prosecuting witness, Danna Franklin, had recently ended their relationship. The defendant had once professed that if he could not have Ms. Franklin, no man would. On the night of April 24, 1974, the defendant followed and overtook the car in which Ms. Franklin and the deceased, Morris Hardy, were traveling. The defendant stopped in front of Ms. Franklin's car, exited from his car, and shot both of them, seriously injuring Ms. Franklin and fatally wounding Mr. Hardy. The defendant took Ms. Franklin to the hospital and sought an ambulance for Mr. Hardy.

Throughout the 1977 trial, the defendant steadfastly maintained that he acted in self-defense. John McMurray, the court appointed attorney for the defendant, adhered to that defense during his cross-examination of the State's

witnesses and during his presentation of the defendant's evidence. During the closing arguments, James Fuller, co-counsel, urged acquittal on the theory of self-defense. Mr. McMurray then made a closing argument expressing his personal opinion that his client should not be found innocent but should be found guilty of manslaughter. The defendant says in his Verified Motion for appropriate relief that Mr. McMurray made the following closing argument without the consent of the defendant:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [*sic.*] and I want to leave here also with a clear conscious [*sic.*]. I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

Before addressing the defendant's assignment of error, this Court must address the procedural issues raised by the State. First, the State asserts that the defendant failed to raise this issue during the direct appeal of his conviction and thereby waived his right to raise it now. Assuming *arguendo* that the State is correct, we choose nevertheless to consider this issue under our power of discretionary review granted by N.C.G.S. § 7A-31 and § 15A-1446.

Second, the State asserts that no transcript of the closing argument was made and that this failure requires dismissal of the appeal. *State v. Sanders,* 280 N.C. 67, 185 S.E.2d 137 (1971). We do not agree. The State has never suggested that the defendant has mischaracterized Mr. McMurray's argument. The trial court based its denial of the defendant's motion on the closing argument as contained in the motion. In verified answers to the interrogatories submitted with the motion, Mr. Fuller, the

defendant's co-counsel, also set forth the substance of Mr. McMurray's closing argument during the 1977 trial. All such documents and matters were parts of the record on appeal. Therefore, the argument by Mr. McMurray was preserved in the record in a form adequate to permit appellate review of the defendant's assignment.

Turning to the merits of this appeal, the defendant contends that his counsel's admission of his guilt and plea for a manslaughter conviction constituted ineffective assistance of counsel in violation of his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States. The test for resolving claims of ineffective assistance of counsel was recently articulated by this Court and by the Supreme Court of the United States. In *State v. Braswell,* 312 N.C. 553, 324 S.E.2d 241 (1985), this Court adopted the Supreme Court's language in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and enunciated the following two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland,* 466 U.S. at ____, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

The defendant cites several cases in support of the proposition that a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance

of counsel. In *Wiley v. Sowders,* 647 F.2d 642 (6th Cir. 1981), the defendant's lawyer admitted his client's guilt and pled for mercy. The court held the defendant was deprived of his Sixth Amendment right to effective assistance when his counsel admitted guilt without first obtaining the defendant's consent to this trial tactic. *See also, King v. Strickland,* 748 F.2d 1462 (11th Cir. 1984); *Francis v. Spraggins,* 720 F.2d 1190 (11th Cir. 1983); *Young v. Zant,* 677 F.2d 792 (11th Cir. 1982); *Commonwealth v. Lane,* 476 Pa. 258, 382 A.2d 460 (1978). Although we find such authority persuasive, we conclude that the defendant in the present case need not show any specific prejudice in order to establish his right to a new trial due to ineffective assistance of counsel.

Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* 466 U.S. 648, ____, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657, 667 (1984); *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Supreme Court has presumed prejudice in various Sixth Amendment cases. That Court has, for example, "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic,* 466 U.S. at ____, 104 S. Ct. at 2047, 80 L. Ed. 2d at 688, n.25. *See, e.g., Geders v. United States,* 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1975) (defense counsel was not allowed to make closing argument); *Cuyler v. Sullivan,* 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (prejudice presumed when counsel affected by actual conflict of interest). Likewise, when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

A defendant's right to plead "not guilty" has been carefully guarded by the courts. *See Wiley v. Sowders,* 647 F.2d 642 (6th Cir. 1981). When a defendant enters a plea of "not guilty", he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. *Wiley,* 647 F.2d at 650.

A plea decision must be made exclusively by the defendant. "A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." *State v. Sinclair,* 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980). Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). N.C.G.S. § 15A-1011 through § 15A-1026; *State v. Sinclair,* 301 N.C. 193, 270 S.E.2d 418 (1980).

This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury. *Wiley,* 647 F.2d at 649-50.

For the foregoing reasons, we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in

which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. Accordingly, we must arrest the judgments against the defendant for murder and assault and remand these matters to the Superior Court, Burke County, with instructions to that court to award the defendant a new trial.

JUDGMENTS ARRESTED; REMANDED FOR NEW TRIAL.

APPENDIX B

STATE OF NORTH CAROLINA
COUNTY OF BURKE

In The General Court of Justice
Superior Court Division
June Session, 1976

THE STATE OF NORTH CAROLINA
v.
WILLIAM HARBISON, JR.
Defendant

INDICTMENT—MURDER

The Jurors For The State Upon Their Oath Do Present, That William Harbison, Jr. late of the William Harbison, late of the County of Burke on the 25th day of April 1976, with force and arms, at and in the said County, feloniously, wilfully and with premeditation and deliberation and of his malice aforethought, did kill and murder Morse Garfield Hardy contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

/s/ **J. Laird Jacobs, Jr.**
Solicitor

Witnesses:

	James Pruett, BCSD	John Suttle, SBI
x	Sam Williams, BCSD	Bruce Allen, SBI
	Stan Jenkins, BCSD	
x	John Devitt, BCSD	

Those marked X sworn by the undersigned foreman,

and examined before the Grand Jury, and this bill found to be A True Bill.

"This finding of a True Bill of Indictment is concurred in by 16 members of the Grand Jury".

/s/ **H. C. Bristol, Jr.**
Foreman Grand Jury

STATE OF NORTH CAROLINA
COUNTY OF BURKE

In The General Court of Justice
Superior Court Division
June Session, 1976

THE STATE OF NORTH CAROLINA

v.

WILLIAM HARBISON, JR.
Defendant

INDICTMENT
ASSAULT WITH INTENT TO KILL
INFLICTING SERIOUS INJURY

The Jurors For The State Upon Their Oath Present, That William Harbison, Jr. late of the County of Burke on the 25th day of April 1976, with force and arms, at and in the County aforesaid, did, unlawfully, wilfully and feloniously assault Dannah Yvonne Franklin with a certain deadly weapon, to wit: A Gun with the felonious intent to kill and murder the said Dannah Yvonne Franklin inflicting serious injuries, not resulting in death, upon the said Dannah Yvonne Franklin to wit: Firing a Shot into her Head and Putting out an Eye against the form of the

Statute in such case, made and provided and against the peace and dignity of the State.

/s/ **J. Laird Jacobs, Jr.**
Solicitor

Witnesses:

James Pruett, BCSD
x Sam Williams, BCSD

Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found To Be A True Bill.

"This finding of a True Bill of Indictment is concurred in by 16 members of the Grand Jury".

/s/ **H. C. Bristol, Jr.**
Foreman Grand Jury

APPENDIX C

JUDGMENT AND COMMITMENT (76CR3865)

In open court, the defendant appeared for trial upon the charge or charge of First Degree Murder and thereupon entered a plea of not guilty.

Having been found by a jury guilty of the offense of Second degree Murder which is a violation of and of the grade of Felony.

It is **Adjudged** that the defendant be imprisoned for the term of his natural life in the Central Prison in Raleigh.

It is **Ordered** that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 4th day of September, 1976.

/s/ **John R. Friday**
Presiding Judge

Attorney for Defendant: John H. McMurray & James C. Fuller, Jr.

Attorney for the State: Donald E. Greene & J. Laird Jacob, Jr.

APPENDIX D

JUDGMENT AND COMMITMENT (86CR3682)

In open court, the defendant appeared for trial upon the charge or charges of Assault with a deadly weapon with intent to kill inflicting serious bodily injury and thereupon entered a plea of not guilty.

Having been found by a jury guilty of the offense of Assault with a deadly weapon inflicting serious bodily injury which is a violation of and of the grade of Felony.

It is **Adjudged** that the defendant be imprisoned for the term of ten (10) years in the common jail of Burke County to be assigned to the State Department of Correction.

It is **Ordered** that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 4th day of September, 1976.

/s/ **John R. Friday**
Presiding Judge

Attorney for Defendant: John H. McMurray & James C. Fuller, Jr.

Attorney for the State: Donald E. Greene & J. Laird Jacob, Jr.

APPENDIX E

STATE OF NORTH CAROLINA

v.

WILLIAM HARBISON, JR.

No. 1

(Filed 11 November 1977)

1. Constitutional Law § 60 — reasonable opportunity to show systematic exclusion of blacks from jury

A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded reasonable time and opportunity must be determined from the facts in each particular case.

2. Constitutional Law § 60 — denial of continuance — opportunity to show systematic exclusion from jury

Defendant was not denied his constitutional right to a reasonable time and opportunity to investigate the possibility of systematic exclusion of blacks from the petit jury by the denial of his motion for continuance made on the day defendant's case was called for trial where the only evidence urged in support of the motion was the fact that sixty prospective jurors were drawn from the box and the thirty-two of them who reported for jury duty were all white; defendant was represented by counsel at least four months before trial; the names of the sixty prospective jurors were publicly known for fifty-five days prior to the trial; and defense counsel was thus afforded a reasonable time and opportunity prior

to the trial to inquire into the race of each juror, the composition of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused and the practices and procedures employed by the chief district judge when passing upon excuses.

3. Criminal Law § 42.2 — real evidence — identity and unchanged condition

Obejcts offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." In order to be admissible, such evidence must be identified as the same object involved in the incident and it must be shown that the object has undergone no material change in its condition since the incident.

4. Criminal Law § 42.2 — identity and unchanged condition of evidence — discretion of court

The trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that an object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition.

5. Criminal Law §§ 42.5, 42.6 — exclusion of tire — failure to show identity and unchanged condition

The trial court did not err in the exclusion of a tire, offered for the purpose of showing the location of bullet damage to the tire, on the ground that the identity and unchanged condition of the tire had not been established where officers who first examined the tire testified that such examination revealed no holes in the tire, and bullets were not discovered in the tire until reexamination of the tire three months after it had been

released from police custody; furthermore, the State was not prohibited from objecting to admission of the tire because police officers — agents of the State — caused the breakdown in the chain of custody by releasing the tire to its owner where there was no evidence that officers knew the tire had been fired into at the time they released it from custody or that defendant's counsel had informed anyone the tire would be material to defendant's case.

6. Homicide § 31.7 — second degree murder — imposition of life imprisonment

The trial judge did not act arbitrarily and capriciously in sentencing defendant to life imprisonment for second degree murder since the punishment is within statutory limits, G.S. 14-17, and is not inappropriate for the brutal, unprovoked murder disclosed by evidence which would have supported a verdict of first degree murder.

Justice Exum dissenting.

DEFENDANT appeals from judgements of *Friday, J.*, 30 August 1976 Session, BURKE Superior Court.

Defendant was tried upon separate bills of indictment charging him with the first degree murder of Morris Hardy on 25 April 1976 and felonious assault upon Dannah Yvonne Franklin on the same date.

The State's evidence tends to show that defendant, a twenty-six-year-old black man, married and the father of two children, and Dannah Franklin, a twenty-year- old unmarried white woman, had known each other for three years, dated for about two years, quit dating in August 1975 but continued an occasional rendezvous on a friendly basis. Because Miss Franklin's father objected to the relationship on account of the racial difference, they would

meet by prearrangement at various secluded parking places along the road.

On 24 April 1976 Miss Franklin had been visiting Mrs. Rena Shade, a colored friend of hers. She arrived at the Shade home between 9 and 10 a.m. and remained until approximately midnight. Morris Hardy, a black man, came to the Shade home about 9:30 p.m. and remained until approximately midnight. This was the second time Miss Franklin had ever seen him. After watching television and talking until approximately midnight, Miss Franklin arose to leave and Morris Hardy asked her to take him home. They left together in her 1968 blue Buick Electra 225. As they proceeded westward on I-40 near Morganton, defendant drove up behind them in his 1975 white Oldsmobile Cutlass. Miss Franklin speeded up and attempted to elude him. Defendant followed the Franklin car for five miles from I-40 over rural paved roads and finally onto the Morningstar Road which is unpaved. When the Franklin car skidded into the ditch line on a stiff curve, defendant succeeded in passing it and stopped his vehicle partially blocking the road. He jumped out of his car with gun in hand and came back to the Franklin vehicle.

Miss Franklin described the events which followed in these words: "He didn't say anything.... He pointed it at the window. I started to go around his car, and the angle he pulled in front of me, I didn't know whether I could get past his car or not without going on up the embankment. He, as I started around his car rolling, he shot at the left front tire. He shot once, and then he slid his steps, and he shot twice.... I felt the tire going down. He was midways of the back end of his car, about three feet, maybe less when he shot.... I seen glass bursting, and it hit me in the face. I screamed.... Morris touched my left arm ... I didn't hear the fourth shot. It hit me in the back of the

head.... I went in the floor between Morris' legs.... I heard the fifth shot. I was praying.... I got up. Morris' arm was laying inside on the same side of hs seat where he was sitting. I touched his arm. I heard him breathing real loud; and then he started groaning ... and I heard him groan three times, or like he was drowning in his blood, or something, and I looked up. I didn't realize at the time that he must have died right there."

The State's evidence further tends to show that defendant got in his car and left the scene but returned after driving about a mile. He overtook Miss Franklin who was walking along the road looking for help. He picked her up and repeatedly said, "I didn't mean to do it." She asked him why he did it and he never did say. He drove Miss Franklin to the hospital after examining Morris Hardy and expressing the opinion that he was probably dead. He threw the murder weapon under the shrubbery at the hospital and it was later recovered by the officers.

Morris Hardy died from a gunshot wound in his back inflicted by a bullet fired from defendant's gun. Miss Franklin suffered a gunshot would in the left eye resulting in its total destruction, necessitating removal.

Defendant testified as a witness in his own behalf. On and prior to 25 April 1976 he was employed as a correctional officer at Western Correctional Center in Morganton. He had known Dannah Franklin since 1972, had dated her on weekends for two years and thereafter continued to see her on an irregular basis until the date this incident happened. According to defendant's testimony, they had a good relationship, including a sexual relationship, and were quite compatible. They would call each other by telephone, arrange a meeting time and place, and if passing each other on the highway would blink their lights on and off, or blow the horn, and then meet at the agreed rendezvous spot. Sometimes, when Miss Franklin's

father was not at home, defendant would pick her up at her home.

Shortly before midnight on the night in question, defendant recognized Dannah Franklin's car on the highway and she blinked her lights. Shortly thereafter the Franklin vehicle left I-40 westbound and defendant followed. He did not recognize the driver and could not tell who was in the car. The Franklin car was half a mile ahead of him as he continued to follow it. The Franklin car proceeded onto a dirt road where the driver accelerated rapidly, throwing gravel, and defendant proceeded to follow it to find out why the car had not stopped. It was on the Morningstar Road when defendant finally succeeded in passing the car. He pulled in front of it and stopped about thirty feet away. Although his car was sitting in the middle of the road, it did not block the road. Defendant got out of his car, walked back toward the Franklin car, still unable to see who was in it, and heard a sudden acceleration. Thinking the driver was trying to run him down, he drew his revolver and fired twice at the left front tire. Demonstrating what happened, defendant said: "As I was walking back towards the car, the car accelerated, gravel started throwing proceeding towards me. At that point, I was scared for my life. I pulled my revolver. I fired twice at the two front tires. The car proceeded. It kept on coming. At that point, I was excited. I panicked. As the car kept coming, the third shot was fired. The third shot hit the window, the glass came out and hit me in the face, and at the same time I was pulling the fourth and fifth rounds."

Defendant further testified that the Franklin car ran off the road following the shooting and he got in his car and left. After driving about a mile he returned to the scene, took Miss Franklin to the hospital and called the sheriff's office to send an ambulance for Morris Hardy.

Defendant later told Detective Pruitt where to find the

murder weapon. He testified that he kept the weapon loaded and on the console in his car at all times for "self-protection." He admitted that he followed the Franklin car five or six miles but asserted he was not chasing it. He denied getting out of the car with pistol drawn. He asserted that no ill will existed between him and the deceased Morris Hardy.

The jury convicted defendant of second degree murder of Morris Hardy and of an assault with a deadly weapon inflicting serious bodily injury on Dannah Franklin. The court imposed a life sentence for the murder and ten year for the felonious assault. He appealed the life sentence directly to the Supreme Court and we allowed a motion to by-pass the Court of Appeals in the assault case to the end that both cases receive initial appellate review in the same court.

Rufus L. Edmisten, Attorney General; *James E. Magner, Jr.,* Assistant Attorney General, for the State of North Carolina.

James C. Fuller, Jr. and *John H. McMurray,* attorneys for defendant appellant.

HUSKINS, Justice

When this case was called for trial on the morning of 30 August 1976 defendant moved for a continuance "to allow him reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegation of racial discrimination as to the petit jury as set forth in this mosion." The unverified motion alleges that: (1) Thirty-two persons had been summoned and appeared for

jury service, all of the white race and none of the Negro race; (2) more than 10 percent of the total population of Burke County are member of the Negro race; (3) lack of a reasonable number of members of the black race on the petit jury panel indicates systemic exclusion of members of the Negro race from jury service in Burke County; and 4) the number of Negroes, if any, on the petit jury for this session of criminal court of Burke County was unknown to defendant until such jurors appeared in the courtroom for jury service.

The motion for continuance was denied. This constitutes defendant's first assignment of error.

The record shows that the names of sixty prospective jurors, corresponding to numbered decals drawn from the box, were taken from the master jury list and certified on 6 July 1976. Those names were available to the public generally and to defense counsel particularly from and after that date. on 30 August 1976, the date this case was called for trial, thirty-two of the sixty prospective jurors appeared in court ready to serve. All were members of the white race. Of the twenty-eight persons who did not report for jury duty, there is no evidence to show how many had died or moved away and were not summoned due to the sheriff's inability to locate them. There is no evidence of record to show how many rendered an excuse and were excused from jury duty by the chief district judge. There is nothing in the record to indicate how many, if any, were Negroes. The record does show that several members of the Negro race served on the jury during the previous week.

Defendant was represented by Attorney McMurray who was appointed on 27 April 1976 and also by Attorney Fuller whose firm had been privately retained on a date not shown by the record. Both are able, experienced attorneys, and Mr. McMurray has practiced law in Burke County for more than twenty years.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent abuse of discretion. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). However, if the motion is based on a right guaranteed by the federal and state constitutions, it presents a question of law and the order of the court is reviewable. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). Defendant urges as error denial of his constitutional right to a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the petit jury in his case, citing *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970), as authority. For reasons which follow, we find no merit in this contention.

Decisions both state and federal hold that: (1) a defendant is not entitled to a proportionate number of his race on the jury which tries him, on the venire from which petit jurors are drawn, or even to have a representative of his race on the jury; (2) a defendant does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded; and (3) a defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. The authorities supporting these principles are cited and discussed in *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970), and *State v. Cornell,* 281 N.C. 20, 187 S.E. 768 (1972).

In his argument to the trial court in support of the motion for a continuance, defense counsel stated: "As I understand the cases, they provide that if this motion is made, even though it's made and the court is of the opinion

that it's made purely for the purpose of a continuance, due process—*State v. Spencer*—holds, as I understand it, that the defendant is entitled to additional time to make that investigation." The statement is erroneous; counsel is acting under a misapprehension of the law. Upon the facts disclosed by the record in this case, defendant had "a reasonable time and opportunity to inquire into and present evidence regarding the alleged sytsematic exclusion of Negroes" from serving on the petit jury in his case, Attorney McMurray was appointed on 27 April 1976. The sixty-member venire was drawn and made public on 6 July 1976. The case was duly calendared and thereafter called for trial on 30 August 1976. At 11:15 a.m. that morning defendant's motion for a continuance was filed. Admittedly, no investigation concerning the jury selection process had been undertaken and no evidence had been compiled, statistical or otherwise, tending to establish that blacks were under-represented in the jury box or on the jury, or that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes had served on the juries of Burke County notwithstanding a substantial Negro population therein. The only evidence urged in support of the motion for continuance is the naked fact that sixty prospective jurors were drawn from the box and thirty-two of them all white, appeared for jury duty. This fact alone does not even suggest a *sytematic exclusion* of Negroes from the petit jury. "Even when there is 'striking' statistical evidence of disparity between the ratio of the races in population and jury service, or of the progressive elimination of potential Negro jurors through the selection process, the courts have considered such evidence, *standing alone,* insufficient to constitute a prima facie case of systematic discrimination. *See Alexander v. Louisiana,* 405 U.S. 625, 31 L.Ed. 2d 536. 92 S. Ct. 1121 (1972); *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965)." *State v. Brower,* 289 N.C.. 644, 653, 224 S.E. 2d 551, 558-59 (1976).

It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. *Compare State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613 (1963); *State v. Perry,* 248 N.C. 334, 103 S.E. 2d 404 (1958). The jury list from which petit jurors are selected is prepared biennially, G.S. 9-2, is a public record, G.S. 9-4, and the jury commissioners who possess knowledge of the sources from which the master jury list is compiled are local residents. G.S. 9-1. Persons who wish to be excused from jury duty must apply to the chief district judge, or another district judge designated by him, at a publicly announced time and place. G.S. 9-6(b). The record here shows that the name of the sixty jurors were publicly known for fifty-five days prior to the time the case was called for trial. This afforded defense counsel reasonable time and opportunity to inquire into the face of each juror, the composition of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused, and the practices and procedures employed by the chief district judge when passing upon excuses. Failure to make such inquiry creates no constitutional right, in the name of Due Process, to additional time for such investigation simply because all jurors who reported for jury duty on the day defendant's case was called for trial were white. An automatic continuance for such inquiries, upon motion lodged for the first time when the case is called for trial, would fatally disrupt every session of court.

Under the facts of this case defendant has not been deprived of a reasonable opportunity to investigate the "possibility" of systematic exclusion of blacks from the petit jury. The lateness of the motion for a continuance suggests only a natural reluctance to go to trial and affords

no basis to conclude that the trial judge abused his discretion or violated defendant's constitutional rights. The motion for continuance was properly denied. Defendant's first assignment of error is overrulled.

On 25 April 1976 Officers Pruitt and Suttle examined the left front tire on the 1968 Buick in which decedent's body had been found. The examination revealed nothing unusual about the exterior of the tire except road damage and the fact that it was flat. Officers Pruitt and Bruce Allen removed the tire from the wheel, broke it down, examined the interior and noticed nothing unusual. The tire was then placed in the trunk of the Buick and, later that day, Officer Pruitt advised the person having custody of the car that the officers' inspection had been concluded and the car could be released to its owner John Franklin, Miss Franklin's father. At the time this inspection and release of the tire took place, defendant had made no statement that he had shot into the tire; rather, he had told Officers Pruitt and Stan Jenkins that he had not been involved in any shooting.

On 31 July 1976 Officer Pruitt had occasion to examine a tire similar in make and appearance to the one he had examined on 25 April. On this examination he discovered two metal objects embedded in the back side of the tire. The tire was thereupon marked for identification and placed in the police evidence room where it remained until trial. Officer Pruitt was of the opinion that the tire he examined on 31 July was the same tire he had examined on 25 April. He testified, however, that his opinion was based on Miss Franklin's statement to him that it was the same tire and that he himself was unable to identify it as such. Neither Miss Franklin nor her father, the owner of the car, were examined concerning the identity of the tire or whether there had been any material change in its condition since the shooting on 25 April.

Defendant sought to offer the tire in evidence, upon objection, it was excluded by the trial judge. This ruling constitutes defendant's second assignment of error.

Objects offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." McCormick, Evidence § 212 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 117, n. 1 (Brandis rev. 1973). Such evidence must be identified as the same object involved in the incident in order to be admissible. *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). It must also be shown that since the incident in which it was involved the object has undergone no material change in its condition. *See* McCormick supra, § 212, p. 527. *See also Hunt v. Wooten,* 238 N.C. 42 76 S.E. 2d 326 (1953). According to Professor Stansbury, when a tangible object is offered it must be first authenticated or identified, "and this can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is." 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973).

There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. "No specific rules have grown up about the authentication of chattels, chiefly because the variety of circumstances involved are so great that no specific rules would be suitable." 7 Wigmore, Evidence § 2129, at 569 (3d ed. 1940). Consequently, the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition. McCormick, *supra* § 212, p. 527, at nn. 25-27. *See, e.g., Walker v. Firestone Tire and Rubber Co.,* 412 F.2d 60 (2d Cir. 1969).

In the present case defendant argues that the location of bullet damage in the tire would tend to show that he was in front of the vehicle at the time the tire was shot and thus tend to corroborate his testimony that he first fired at the vehicle as a defensive measure when Miss Franklin attempted to run him down. Even so, the record shows the trial court had before it the testimony of the officers who examined the tire on 25 April to the effect that their examination on that date revealed no holes in the tire. After the tire had been excluded, Officer Pruitt testified that even after the tire was broken down for examination of its interior on 25 April he observed nothing unusual about it except that is was flat. The bullets were not discovered until reexamination of the tire three months after it had been released from police custody. Under these circumstances Judge Friday quite properly insisted that defendant establish the identity and unchanged condition of the tire before admitting it into evidence. there was not testimony identifying the tire offered at trial. There was no evidence of unchanged condition. Rather, testimony at trial suggested that the examinations conducted on 25 April and 31 July (of what was alleged to have been the same tire) showed conflicting results. In our view Judge Friday properly excluded the tire and the testimony concerning examinations of it conducted on 31 July and thereafter.

Defendant further argues, however, that since the police officers—agents of the State—caused the breakdown in the chain of custody, the State should not be permitted to object to the introduction of the tire. It suffices to say that there is no evidence indicating the officers knew the tire had been fired into at the time they released it from custody. Nor is there any indication that defendant's counsel had informed anyone the tire would be material to defendant's case. Neither bad faith nor negligence can be ascribed to the officers under such circumstances. Defendant's second assignment of error is overruled.

Finally, defendant contends the trial judge acted arbitrarily and capriciously in sentencing him to life imprisonment for second degree murder. This assignment is overruled without discussion. The punishment is within statutory limits, G.S. 14-17 (1975 Cum. Supp.), and not inappropriate for the brutal, unprovoked murder and felonious assault disclosed by evidence which would have supported a verdict of murder in the first degree.

Prejudicial error in the trial not having been shown, the verdicts and judgments must be upheld.

NO ERROR

Justice EXUM dissenting.

I dissent on the ground that defendant was not afforded a reasonable opportunity to inquire into and present evidence to support his contention that there was systematic exclusion of people of the black race from the petit jury that tried him. The majority recognizes the principle that such opportunity must be given when the defendant alleges such systematic exclusion. Its position is that since the jury panel for the week of court at which defendant was tried was selected some weeks before the trial began the defendant had an opportunity to develop such evidence as was available. He would have, the majority says, examined the names of the 60 jurors summoned for duty on the panel. I think the majority relies more on theory than reality. An examination of the 60 jurors summoned for duty could not have revealed which of those jurors would ultimately find their way into the courtroom to form the panel from which defendant had to select the petit trial jury. Obviously almost half of these names were somehow culled, or for some other reason did not apepar for jury duty on the day defendant's case was called for trial. It was not until defendant arrived in the courtroom that he knew, or could have known, that the panel from which is petit jury was to be selected contained not a single member of his race. Faced with that circumstance I

think defendant should have been entitled to inquire into the reasons and be given an opportunity to present evidence on the point he raised.

"Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have unless he has a reasonable opportunity and time to invetigate and produce his evidence, if he has any." *State v. Perry,* 248 N.C. 334, 339, 103 S.E. 2d 404 (1958); *accord, State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613 (1963). In both *Perry* and *Inman* new trials were granted under circumstances quite similar to those presented by defendant in this case.

APPENDIX F

IN THE
DISTRICT COURT OF THE UNITED STATES
ASHVILLE DIVISION

Civil No. A-C-83-225
[Filed December 12, 1983]

WILLIAM HARBISON, JR.,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

JUDGMENT

This matter having come before the court upon a petition for writ of habeas corpus, and the issues having been determined, as shown by a Memorandum of Decision entered by the court simultaneously herewith;

It Is Ordered, Adjudged, And Decreed that the petition for writ of habeas corpus be, and the same is hereby, denied, and the action is hereby dismissed.

The Clerk is directed to certify a copy of this Judgment and the Memorandum of Decision to the Attorney General of North Carolina, petitioner, and petitioner's attorneys.

This 9th day of December, 1983.

/s/ **Woodrow W. Jones**
Chief Judge,
United States District Court

IN THE
DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHVILLE DIVISION

Civil No. A-C-83-225
[Filed December 12, 1983]

WILLIAM HARBISON, JR.,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

MEMORANDUM OF DECISION

Petitioner, a state prisoner, seeks federal habeas corpus relief, pursuant to Title 28, United States Code, Section 2254, claiming that he is unlawfully being held in state custody due to the failure of the state to protect and allow into exculpatory evidence. In this regard, petitioner contends:

> [T]hat he fired in self defense at a car moving toward him.. The State contended that Petitioner committed an execution-type murder from beside the driver's side window after first shooting out the tires. The tire showed penetration marks on the flat surface or front, rather than on the donut or side, thus corroborating Petitioner's version. However, because the State's police had broken the chain of evidence, the State's prosecutor objected to the evidence and the State's judge excluded the only

evidence in existence that could — and did — support Petitioner's version of the events.

I. STATEMENT OF CASE

The Attorney General of North Carolina answered, moved to dismiss, and furnished the court with numerous documents relating to the proceedings in the state courts.

Petitioner was convicted at the August 1976 session of the Catawba County superior Court of felonious assault (76-CR-3685) and murder (76-CR-3682) and was sentenced to imprisonment for concurrent terms of life (for murder) and ten years (for felonious assault). Petitioner appealed his convictions to the North Carolina Supreme Court, which court, in an opinion filed November 11, 1977, and reported at 293 N.C. 474, found no error. At trial and on appeal, petitioner was represented by court-appointed counsel, John H. McMurray, and retained counsel, James C. Fuller, Jr.

On direct appeal, petitioner presented the contentions in the instant petition and has, therefore, exhausted his state remedies as required by Title 28, United States Code, Section 2254.

A summary of the evidence at trial is, as follows:

The state's evidence showed that petitioner, a 26-year-old black man, married and the father of two children, and Dannah Franklin, a 20-year-old unmarried white woman, had known each other for three years, dated for about two years, quit dating in August 1975 but continued an occasional rendezvous on a friendly basis. Because Miss Franklin's father objected to the relationship on account of the racial difference, they would meet by prearrangement at various secluded parking places along the road.

On April 24, 1976, Miss Franklin had been visiting Mrs. Reba Shade, a colored friend of hers. She arrived at the Shade home between 9 and 10 a.m. and remained until approximately midnight. Morris Hardy, a black man, came to the Shade home about 9:30 p.m. and remained until approximately midnight. This was the second time Miss Franklin had ever seen him. After watching television and talking until approximately midnight, Miss Franklin arose to leave and Morris Hardy asked her to take him home. They left together in her 1968 blue Buick Electra 225. As they proceeded westward on I-40 near Morganton, petitioner drove up behind them in his 1975 white Oldsmobile Cutlass. Miss Franklin speeded up and attempted to elude him. Petitioner followed the Franklin car for five miles from I-40 over rural paved roads and finally onto the Mornigstar Road, which is unpaved. When the Franklin car skidded into the ditch line on a stiff curve, petitioner succeeded in passing it and stopped his vehicle partially blocking the road. He jumped out of his car with gun in hand and came back to the Franklin vehicle.

Miss Franklin described the events which followed in these words:

> He didn't say anything. . . . He pointed it at the window. I started to go around his car, and the angle he pulled in front of me, I didn't know whether I could get past his car or not without going on up the embankment. He, as I started around his car rolling, he shot at the left front tire. He shot once, and then he slip his steps, and he shot twice. . . . I felt the tire going down. He then raised up and shot through the window. He was midways of the back end of his car, about three feet, maybe less when he shot. . . . I seen glass bursting, and it hit me in the face. I screamed. . . . Morris touched my left arm I

> didn't hear the fourth shot. It hit me in the back of the head. . . . I went in the floor between Morris' legs. . . I heard the fifth shot. I was praying. . . . I got up. Morris' arm was laying inside on the same side of his seat when he was sitting. I touched his arm. I heard him breathing real loud; and then he started groaning. . . and I heard him groan three times, or like he was drowning in his blood, or something, and I looked up. I didn't realize at the time that he must have died right there.

The state's evidence further showed that petitioner got in his car and left the scene but returned after driving about a mile. He overtook Miss Franklin, who was walking along the road looking for help. He picked her up and repeatedly said, "I didn't mean to do it." She asked him why he did it, and he never did say. He drove Miss Franklin to the hospital after examining Morris Hardy and expressing the opinion that he was probably dead. He threw the murder weapon under the shrubbery at the hospital, and it was later recovered by the officers.

Morris Hardy died from a gunshot wound in his back inflicted by a bullet fired from petitioner's gun. Miss Franklin suffered a gunshot would in the left eye resulting in its total destruction, necessitating removal.

Petitioner testified as a witness in his own behalf. On and prior to April 25, 1976, he was employed as a correctional officer at Western Correctional Center in Morganton. He had known Dannah Franklin since 1972, had dated her on weekends for two years, and thereafter continued to see her on an irregular basis until the date this incident happened. According to petitioner's tetimony, they had a good relationship, including a sexual relationship, and were quite compatible. They would call each other by telephone, arrange a meeting time and place, and if passing each other

on the highway would blink their lights on and off, or blow the horn, and then meet at the agreed rendezvous spot. Sometimes, when Miss Franklin's father was not at home, petitioner would pick her up at her home.

Shortly before midnight on the night in question, petitioner recognized Dannah Franklin's car on the highway and she blinked her lights. Shortly thereafter, the Franklin vehicle left I-40 westbound and petitioner followed. He did not recognize the driver and could not tell who was in the car. The Franklin car was half a mile ahead of him as he continued to follow it. The Franklin car proceeded into a dirt road where the driver accelerated rapidly, throwing gravel, and petitioner proceeded to follow it to find out why the car had not stopped. It was on the Morningstar Road when petitioner finally succeeded in passing the car. He pulled in front of it and stopped about 30 feet away. Although his car was sitting in the middle of the road, it did not block the road. petitioner got out of his car, walked back toward the Franklin car, still unable to see who was in it, and heard a sudden acceleration. Thinking the driver was trying to run him down, he drew his revolver and fired twice at the left front tire. Demonstrating what happened, petitioner said:

> As I was walking back towards the car, the car accelerated, gravel started throwing proceeding towards me. At that point, I was scared for my life. I pulled my revolver. I fired twice at the two front tires. The car proceeded. It kept on coming. At that point, I was excited. I panicked. As the car kept coming, the third shot was fired. The third shot hit the window, the glass came out and hit me in the face, and at the same time I was pulling the fourth and fifth rounds.

Petitioner further testified that the Franklin car ran off the road following the shooting and he got in his car and left. After driving about a mile, he returned to the scene,

took Miss Franklin to the hospital and called the sheriff's office to send an ambulance for Morris Hardy.

Petitioner later told Detective Pruitt where to find the murder weapon. He testified that he kept the weapon loaded and on the console in his car at all times for "self-protection." He admitted that he followed the Franklin car five or six miles but asserted he was not chasing it. He denied getting out of the car with pistol drawn. He asserted that no ill will existed between him and the deceased Morris Hardy.

The petitioner bases his claim on two alternate legal theories. The first is that the state had a duty under the antisuppression requirements of *Brady v. Maryland,* 373 U.S. 83 (1963), to preserve the chain of custody with regard to a tire because the state knew, or should have known, the tire was valuable defense evidence, and that petitioner's failure to so preserve it should have excused the requirement of showing the chain of cutsody. The second is that the requirement of showing a chain of custody should not have been dispensed with because of the importance of the evidence and the lack of any likelihood of tampering under the rationale of *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The background with regard to the tire, both from the standpoint of chain of custody problems and the standpoint of its being excluded from evidence is as follows:

> The evidence of both sides showed the victims were shot as they drove by petitioner in an automobile on a secluded mountain, dirt road. Petitioner claimed he had followed the victims' car there by prearranged signal but when he arrived, stopped and got out of his car and approached the victims' car, it bore down on him. He then shot its occupants in self-defense.

(Tr. at 148, et seq.). The remaining living victim testified that she was forced to stop at the location after failing to elude petitioner (her jealous ex-boyfriend) successfully, and that petitioner shot her and the deceased as she unsuccessfully sought to drive away. (Tr. at 115, et seq.). The evidence of both parties, as well as the physical evidence, showed that the victims were assaulted through the passenger-side window. (Tr. at 38, 39, 50, 114, 121, 135, 164, 182). The state's evidence also showed that the left front tire went flat after the first two shots. (Tr. at 121). Other physical evidence tended to support the state's version of the case as well. (Tr. at 220-227). However, the evidence of neither party pinpointed the particular part of the tire aimed for, the angle of the shots, or the proximity of the car to the petitioner when the shots were fired. Therefore, the placement of any bullet holes in the tire was not made particularly important by being consistent with one express version of the evidence or inconsistent with the other until the cross-examination of petitioner, at which time he asserted he fired from directly in front of the car into the tire tread. (Tr. at 182).

The investigating officers made several inspections of the tire. The first two were made on April 25, 1976, during the early morning following the shootings and in the early afternoon of the same day. The inspections revealed nothing other than the tire being flat. (Tr. at 35, 53, 55, 208). Because nothing was revealed, the tire, along with the car, was released to its owner on April 25, 1976. (Tr. at 211). A tire which was possibly the same one which was on the victims' car, but which could not positively be identified (Tr. at 244–245), was reclaimed on July 31, 1976, from the commercial garage of a relative of one of the victims. (Tr. at 209, 243). It was inspected and found at that time to contain two

metal fragments (but no entrance points) (Tr. at 238-239), although by that time the tire was off its rim. Finally, the tire reclaimed on July 31, 1976, was reinspected on September 1 and 2, 1976. (Tr. at 237). On the last of those occasions (the record being unclear as to the former), this was done in the presence of petitioner's lawyer, Mr. Fuller, and his investigator. They pointed to some damage, similar to other damage on the tire and apparently in the side of the tire. (Tr. at 241-242). The investigating officer inspecting the tire with them said he could find no puncture in the tread. (Tr. at 239).

Evidence on this matter surfaced early in the trial, with investigating officers Samuel Williams and James Pruitt testifying about their examinations of the car and what they revealed. (Tr. at 35, 68). However, the matter was not gone into closely at that time. In particular, there was no attempt to establish that the tire showed puncture marks in the tread. Mr. Pruitt was ultimately recalled as a part of the defense case. (Tr. at 206, et seq.). Questioning then began in detail about a later inspection, made during trial, of the tire which, it later came out, Mr. Pruitt could not positively identify as the same one which was on the victims' car on the night of the crime. (Tr. at 244-245). At first there was an objection to this. The district attorney then withdrew his objection concerning the subsequent inspection made July 31 and offered to permit the tire into evidence if the defense would stipulate to the chain of custody. (Tr. at 209). This was ignored by the defense, however, with Mr. McMurray then attempting unsuccessfully to show a chain and to show that petitioner had told the investigating officers his story by the time of the car's release. However, the evidence showed that it was not until petitioner's third statement (Tr. at 251-259, 212, 214-217, 262-263), given April 27--a day and a half following the cars release to its owners--that he admitted his participation in the criminal episode. (Tr. at 262). His two earlier versions had been to the effect that he just

happened on the scene or was drawn there by loud noises which he overheard. Later, during the course of cross-examination of Mr. Pruitt by the prosecutor, the defense attorney stated that he would permit the tire to be introduced by the state. The state, however, was unwilling to do so without the chain being established (Tr. at 227). At that time, no urging was made to the tire being particularly important or the chain of custody requirement being unconstitutionally burdensome in this case. The day after Mr. Pruitt's testimony, evidence was again taken from him outside the presence of the jury (Tr. at 237-246) covering the matters set forth in the paragraph above, such as the speculative nature of the damage. Mr. Pruitt's evidence was apparently accurate in all regards, as the defense investigator who had examined the tire with him as not called to contradict his testimony.

II. Allegations

With regard to the first of petitioner's two contentions, there is no duty on the police to investigate or prepare a case in any given way or to recognize the value of potential evidence. *Biddy v. Diamond,* 516 F.2d 118 (5th Cir.), *reh. denied,* 9/8/75; *State v. Noell,* 284 N.C. 670, 692 (1974). This is especially true in this case, as information concerning the chain of custody was equally available to the prosecution and the defense. *United States v. Johnston,* 543 F.2d 55 (8th Cir. 1976). Petitioner bases this contention on the antisuppression requirements of *Brady v. Maryland, supra,* but the *Brady* decision is no help to petitioner. That decision dealt with the failure of the prosecution to turn over a statement in a murder case that a codefendant (not Brady) acutally did the killing for which Brady had been sentenced to death. This was done after a specific requet was made by Brady for this obviously important evidence.

The *Chambers v. Mississippi, supra,* case is inapplicable to petitioner's second contention. Chambers (the evidence against whom was minimal) was denied the opportunity to cross-examine a witness about the recantation of his

confession which would wholly exculpate Chambers. The denial to cross-examine the witness was due to a state law regarding the examination of witnesses which was described as irrational and archaic. In addition, Chambers was denied the opportunity to put three hearsay confessions by the same party into evidence despite their reliability on the facts of the case. By contrast, the tire involved in petitioners case is hardly as probative as four confessions of another, and the chain of custody requirement is neither archaic nor irrational. Instead, the exclusion of the tire dealt with evidence of minimal importance and of questionable reliability. The damage to the tire consisted of scuff marks which could not be distinguished from road damage. These marks were not noted in the initial inspection but only after the tire had been lying around in a commercial garage for at least ninety plus unaccounted for days. This afforded many opportunities for additional damage, especially since the tire was off the rim when it was discovered, assuming it was the same tire.

Furthermore, this court is bound by the decisions of the North Carolina Supreme Court on matters of state law involving evidentiary matters. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Winters v. New York,* 333 U.S. 507 (1948). With regard to the exclusion of the tire and the testimony concerning examinations of it conducted on July 31, 1976, and thereafter, the North Carolina Supreme Court stated:

> In the present case defendant argues that the location of bullet damage in the tire wound tend to show that he was in front of the vehicle at the time the tire was shot and thus tend to corroborate his testimony that he first fired at the vehicle as a defensive measure when Miss Franklin attempted to run him down. Even so, the record shows the trial court had before it the testimony of the officers who examined the tire

on 25 April to the effect that their examination on that date revealed no holes in the tire. After the tire had been excluded, Officer Pruitt testified that even after the tire was broken down for examination of its interior on 25 April he observed nothing unusual about it except that it was flat. The bullets were not discovered until reexamination of the tire three months after it had been released from policy custody. Under these circumstances Judge Friday quite properly insisted that defendant establish the identity and unchanged condition of the tire before admitting it into evidence. There was no testimony identifying the tire offered at trial. There was no evidence of unchanged condition. Rather, testimony at trial suggested that the examinations conducted on 25 April and 31 July (of what was alleged to have been the same tire showed conflicting results. In our view Judge Friday properly excluded the tire and the testimony concerning examinations of it conducted on 31 July and thereafter.

Defendant further argues, however, that since the policy officers--agents of the State--caused the breakdown in the chain of custody, the State should not be permitted to object to the introduction of the tire. It suffices to say that there is no evidence indicating the officers knew the tire had been fired into at the time they released it from custody. Nor is there any indication that defendant's counsel had informed anyone the tire would be material to defendant's case. Neither bad faith nor negligence can be ascribed to the officers under such circumstances. Defendant's second assignment of error is overruled.

293 N.C. at 484-485.

There being no merit to either of Petitioner's contentions regarding the excluded testimony this court accepts the findings of the state court of these questions. *Sumner v. Mata,* 449 U.S. 539 (1981); *Townsend v. Sain,* 372 U.S. 293 (1963). Accordingly, petitioner's allegation will be dismissed.

III. Conclusion

In applying the standards set forth in *Jackson* v. *Virginia,* 443 U.S. 307 (1979), this court concludes that proof of guilt was sufficient to convince a rational trier of fact beyond a reasonable doubt.

In accordance with the Fourth Circuit's decision in *Gordon v. Leeke,* 574 F.2d 1147 (4th Cir.), *cert. denied,* 439 U.S. 970 (1978), this court has carefully examined the file to determine whether petitioner could prove any set of facts in support of his claims that would entitle him to relief. The court has found no basis in fact for petitioner's allegations, and a judgment denying the writ, in accordance with these findings and conclusions, shall be entered simultaneously herewith.

This 9th day of December, 1983.

/s/Woodrow W. Jones

CHIEF JUDGE,
UNITED STATES DISTRICT COURT

APPENDIX G

MOTION FOR APPROPRIATE RELIEF
(Filed: 1984 May 3, A.M. 9:17)

Now Comes, William Harbison, Jr., the defendant in the above-captioned case, pursuant to North Carolina General Statutes 15A-1411, the defendant hereby makes a motion for appropriate relief under North Carolina General Statute 15A-1415. In support of this motion the defendant will show unto the Court, the following:

Defendant was convicted of Second Degree Murder and Assault with a Deadly Weapon inflicting serious bodily injury, on August 30, 1976. The Court imposed a Life sentence for the murder and Ten years for the felonious assault.

The grounds for this motion are:

(1) **The defendant was not afforded effective assistance of counsel.**

(a). The defendant informed his court-appointed counsel, John McMurray, two weeks prior to his trial, that he had obtained other counsel, James C. Fuller, Jr., and that he would like for Mr. McMurray to allow his hired counsel Mr. Fuller to be his replacement in this case. However, Mr. McMurray failed to comply with the defendant's request, and informed the defendant that he had waited to long to make such a request.

(b). The defendant's request was based on the fact that since the date of his appointment to the case, the defendant had only been allowed the opportunity to talk to Mr. McMurray twice, this period of time beginning in April of 1976 and ending in August of

1976. The defendant made several requests to have his court-appointed counsel, Mr. McMurray, come see him in order to discuss his case with him in hopes of preparing an adequate defense. The defendant had several of his family members inform Mr. McMurray of his wishes to consult with him, which he failed to comply with. Therefore, the defendant requested of Mr. McMurray to allow his newly obtained counsel replace him on the case; to which he refused to do.

(c). After Mr. McMurray's refusal to comply with the defendant's request, the defendant called his retained counsel Mr. James C. Fuller, Jr., and informed him of what was said by Mr. McMurray. Mr. Fuller then informed the defendant that he would inform Mr. McMurray of his desire to handle the case and that he had been retained by the defendant to do so. However, he was told by Mr. McMurray that he would only be allowed to sit on the case as an assistant counsel, but that he, Mr. McMurray would remain Chief Counsel for the defense.

(d). The defendant had no other choice other than to accept this arrangement, because Mr. Fuller informed him that there was nothing else that could be done. The defendant informed his court-appointed counsel, Mr. McMurray, that he would enter a plea of not guilty, by reasons of self-defense, because the victim and prosecuting witness were attempting to run the defendant down with an automobile. That he attempted to prevent them from doing so, by first firing two shots at the tire of the automobile.---This action was even supported by the testimony of the prosecuting witness---.

(e). The defendant's court-appointed counsel, Mr. McMurray, was informed of these facts prior to the defendant's trial, and made no efforts to obtain

possession of the tire in question, which could have been offered as evidence in the defendant's behalf, to support the defendant's allegation of self-defense. However, due to Mr. McMurray neglectful actions, by failing to do proper investigation, resulted in the exclusion of the tire by the Court, on the grounds that the identity and unchanged condition of the tire had not been established.

(f). The defendant's court-appointed counsel, Mr. McMurray, also caused the breakdown in the chain of custody, by not informing anyone that the tire would be material to the defendant's case. The police officers-having no knowledge that the tire had been fired into - released the tire to its owner. The importance of this evidence to the defendant's case was that it was the essential corroborating factor in the entire case. The tire would have supported the defendant's claim that he was in front of the vehicle at the time the tire was shot, that the vehicle was coming toward the defendant, that he fired at the vehicle first as a defensive measure, and that the victim and prosecuting witness was attempting to run the defendant down with the vehicle.

(g). During the defendant's court-appointed counsel's Mr. McMurray, closing arguments to the jury, he made the following statement:

> Ladies and Gentlemen of the jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious and I want to leave here also with a clear conscious. I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of

manslaughter and not first degree.

These statements were in direct contradiction to the defendant's plea, thereby defeating the defendant's defense, which was error by the defendant's court-appointed counsel, Mr. McMurray. Once the defendant had decided to enter a plea of not guilty by reason of self-defense, the defendant's counsel was bounded by law to uphold that decision, and to aid the defendant in establishing that defense, which would also include the closing argument. If his personal opinion was of a nature which contradicted with the defendant's defense, he should have asked to be removed from the case or in this case honored the defendant's request to allow his retained counsel, Mr. Fuller, handle the defendant's case.

(2) Conclusion

It is clearly demonstrated by the fact as stated herein, that the defendant was not afforded effective assistance of counsel, and to further support the defendant's claim, attached hereto is a set of INTERROGATORIES and the ANSWERS THERETO, which were submitted to the defendant's retained counsel, Mr. James C. Fuller, Jr., and answered in full by him.

The defendant has offered facts beyond a doubt that he was not afforded effective assistance of counsel, and it is through these facts that the defendant request the following relief:

(3) Relief Requsted

That this Honorable Court issue an Order granting the

defendant's Motion for Appropriate Relief, setting aside the defendant's sentences of Life and Ten years, and granting the defendant a New Trial, due to the ineffective actions of his court-apponted counsel, Mr. John McMurray.

For this relief and/or whatever other relief this Court deems just and fair the defendant will forever pray.

This the 1st day of May, 1984.

/s/ **William Harbison, Jr.**
Defendant pro se

(Verified by William Harbison, Jr., this First day of May, 1984.)

Certificate of Service

I, William Harbison, Jr., hereby certify that I have served a true and correct copy of the foregoing Motion For Appropriate Relief upon the District Attorney by placing same in a sealed, postage prepaid envelope addressed to District Attorney's Office Burke County Courthouse, Morganton, N.C. 28655 and depositing same in the United States mail this 1st day of May, 1984.

/s/ **William Harbison, Jr.**

(Sworn to this First day of May, 1984.)

APPENDIX H

ART. 89 POST-TRIAL RELIEF

§ 15A-14.11 Motion For Appropriate Relief.

(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420.

(b) A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding.

(c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus. (1977, c. 711, s. 1.)

APPENDIX I

§ 15A-1415. Grounds For Appropriate Relief Which May Be Asserted By Defendant After Verdict And Without Limitation As To Time.

(a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time

and which has a direct and material bearing upon the guilt or innocence of the defendant.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served. (1977, c. 711, s. 1; 1981, c 179, s. 7.)

APPENDIX J

ANSWER TO INTERROGATORIES

WILLIAM HARBISON, JR.,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

---

1. Yes.

2. I was willing. Others will have to speak to my ability.

3. Yes. Mr. Harbison's father retained our Charlotte law firm about 10 days before trial was scheduled. I promptly contacted Mr. McMurray who indicated a willingness to withdraw. We met together with Judge Friday to request a postponement. Surprisingly, Judge Friday seemed quite familiar about the facts of the case and denied our request almost before we could finish making it. Although he had indicated earlier a willingness to step aside, Mr. McMurray agreed to remain as court-appointed counsel because there simply was no time for me to fully and adequately prepare. Therefore, we proceeded as co-counsel.

4. This question is impossible to answer directly because it calls for factual and legal conclusions. In past conversations with Mr. Harbison, he has expressed concern about two primary areas. In hopes of answering the spirit of this question, I will address those two areas.

First, as trial approached, it became apparent that there had not been a physical inspection of the shooting site or a

physical inspection of the death vehicle's damaged tire that would later be the subject of several appeals. With our investigator Les Burns, I checked both. I never discussed the question with Mr. McMurray and, therefore, have no idea about his reason for not conducting the inspections or whether he thought such was unnecessary.

In my opinion, the tire offered the only evidence supporting a defense that could lead to acquittal. The scene was less important since there were numerous sketches and photos.

The second question arose during closing argument. Going first for the defense, I argued for acquittal based on our theory of self-defense, suggesting that the car had sped at Mr. Harbison, that he had fired first to stop the speeding vehicle, and that the last several rounds were fired in a panic as the car sped past. While the argument is theoretically sound, and supported by the holes in the tire, it would be a difficult argument to sale to a jury under any conditions. Mr. McMurray followed. During his argument, I was quite surprised to hear him suggest to the jury that Mr. Harbison should be convicted of manslaughter. He asked the jury to choose between two "extreme views," that advanced by me and by the District Attorney. During his argument, Mr. Harbison became visibly upset. He asked the investigator and me several times in whispered tones if Mr. McMurray was on his side or the State's. Later, I indirectly expressed my surprised to Mr. McMurray. He responded that he knew personally a number of the jurors and believed there was no reasonable possiblity of their returning a verdict of acquittal. Therefore, he tried to give them a middle ground that would be less painful to Mr. Harbison than a conviction for murder. To my knowledge, Mr. Harbison never consented to such an argument.

5. To some extent, I have answered this question in No.

4 above. To a greater extent, it is a legal question for the reviewing judge.

6. This question is also answered to the extent possible in No. 4 above.

7. It is quite difficult to identify a single reason for the tire's exclusion. Frankly, I continue to believe it was improper regardless. Initially, when we offered the tire, the District Attorney objected on the grounds of a break in the chain of custody. At one point, he said that he would offer the tire himself if it were admissible. We promptly offered to stipulate to the tire's admissibility. Then, the District Attorney hedged on his offer, especially when it became apparent that the tire would be favorable to our view of the case. I thought the trial judge's ruling was remarkable: That a defendant could lose the right to offer the only corroborative evidence that existed because the flaws in the chain of control brought on by police action and inaction. Obviously, the Supreme Court did not share my concern.

If admissible, I think an earlier identification of the tire and how it fit into the theory of self-defense would have been vital to an aggressive defense of Mr. Harbison. However, based on this strange ruling by the trial judge, it is hard to figure out what Mr. Harbison or I could have done that would have made the judge admit the tire into evidence before the jury.

8. This question can best be answered by reference to the written Opinion of the N.C. Supreme Court.

9. Yes.

I Affirm:

/s/ **Jim Fuller**
James C. Fuller, Jr.

APPENDIX K

ORDER

(Filed: 1984 June 12, P.M. 3:54)

This Matter Coming On To Be Heard Upon A Motion For Appropriate Relief filed by the Defendant on May 3, 1984 and the Court having read and considered this motion the interrogatories, the answers to the interrogatories, the files and the appellate review; and the Court finds that the Defendant was convicted of Second Degree Murder and Assault with a Deadly Weapon Inflicting Serious Bodily Injury on August 30, 1976; and that the Defendant was represented by Attorneys John H. McMurray and James C. Fuller, Jr.; and that a motion made by counsel to postpone or continue the cases was denied and that the Defendant had ample opportunity to subpoena witnesses and to present evidence and that further appellate review or action was denied.

The Court finds and concludes as a matter of law that the Defendant has not been deprived of proper legal representation. The Appellate Courts have previously held that the standard of effective representation of counsel is not the same as errorless representation. The fact that the defense may not have been the best is not within itself grounds for relief.

This Court further finds that the personal comments and opinions expressed by counsel were not proper,

[but further finds that the statements were not and do not constitute prejudicial error.]

EXCEPTION NO. 1

[Now Therefore, The Court Concludes As A Matter Of Law that the Defendant has received a fair trial, has been

given appellate review and that the Defendant's Motion is without merit and is hereby denied and dismissed.]

EXCEPTION NO. 2

It Is Therefore Ordered that the Clerk of Superior Court forward a copy of this Order to the Defendant and a copy to the Assistant District Attorney, J. Gary Dellinger.

This the 12th day of June, 1984.

/s/ **Claude S. Sitton**
Resident Superior Court Judge

APPENDIX L

ORDER

(Supreme Court of North Carolina (No. 400PA84))

This matter is before the Court upon the defendant's Petition for Writ of Certiorari to review the superior court's denial of his motion for appropriate relief. Defendant's Petition for Writ of Certiorari is ALLOWED, with review limited to whether trial counsel's argument to the jury constituted prejudicial error.

The appellate defender is appointed to represent the defendant in this matter.

By order of the Court in Conference, this 6th day of November, 1984.

/s/ **Frye, J.**
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 13th day of November 1984.

/s/ **J. Gregory Wallace**
Clerk of the Supreme Court

Copy to:

Mr. William Harbison, Jr., pro se
Mr. Newton G. Pritchett, Jr., Associate Attorney
Mr. Major A. Joines, Clerk of Superior Court
Mr. Robert E. Thomas, District Attorney
Mr. Adam Stein, Appellate Defender
West Publishing Company
Mr. Ralph White, Court Reporter

APPENDIX M

[52]

VOLUME 2

JOHN McMURRAY

DIRECT

Mr. Byrd: John H. McMurray, be sworn, please.

Whereupon

JOHN H. McMURRAY,

Having been first duly sworn,
was examined and testified
as follows:

DIRECT EXAMINATION BY MR. BYRD:

Q. What is your name, sir?

A. John H. McMurray.

Q. Are you the defendant in this civil proceeding, the State Bar versus you, sir?

A. Yes.

Q. How old are you?

A. Sixty-two (62), born October 24th, 1922.

Q. Are you a member of the Bar?

A. Yes.

Q. How many years?

A. Since September '48, I believe.

Q. You've practiced law some thirty-eight (38) years approximately?

A. Since — continuously since that time.

Q. Have you ever in your lifetime been disbarred?

[53]

A. No, sir.

Q. Have you ever in your lifetime been suspended by the North Carolina Bar or any Bar Association in America?

A. No, sir.

Q. Have you ever in your lifetime ever been publicly reprimanded by the North Carolina Bar or any other Bar Association in this World?

A. No, sir.

Q. Have you ever in your life ever even received a private censure from the North Carolina Bar or any other Bar Association?

A. No, sir.

Q. Have you ever been held in contempt of court?

A. No, sir.

Q. Are you a trial lawyer?

A. Yes, sir.

Q. Approximately how many murder cases have you defended in your thirty-eight (38) years of practice, Mr. McMurray?

A. It's difficult to say. Last night I thought about that. I could sit here and tell you fifteen (15) to twenty (20) that I can remember..

Q. First degrees?

[54]

A. Most of the time they're charged with first degree. I can remember the case, generally the judge. I can remember the facts in all of them. I know the result in all of them.

Now, it gets more difficult those that just don't come to your mind. So, it's hard for me to give a precise number.

Q. And I believe that your counsel that's asking questions of you have had — been on opposite sides of several very serious homicide cases, have we not?

A. Well, we've been on the same side and on the opposite side.

Q. Did you appear as counsel in the case of State of North Carolina versus Clay Cooper?

A. Yes, sir.

Q. Did I likewise appear with you, sir?

A. Yes, sir.

Q. Did you appear as counsel with Mr. Bruce Vanderbloemen in the case *State of North Carolina versus Woods*?

A. Yes. Brian Eugene Woods, yes, sir.

Q. Approximately when were you appointed as counsel for *State versus Harbison* by the court in Burke

[55]

County in relation to when the events occurred?

A. I think the — I think the homicide occurred about midnight, I believe, on April 25th, 1976, if I have the date correct. He was taken into custody that night and it was probably the next morning, and was lodged in the jail in Caldwell County. And he was in jail in Caldwell County over the weekend.

My best recollection is that I was appointed when he came back to Burke County, probably the early part of that week which would have been the 27th of April, probably.

Q. Did you have bail set for your client after you were appointed, or was he released on bail, regardless of who set it?

A. I cannot recall how bail was set, but it was set, because I took him home, as I recall, about midnight when bond was made for him.

Q. Was that shortly after you were appointed?

A. Yes, sir.

Q. Did you go to the scene of this homicide?

A. Yes, sir. I went to the scene. I can recall having — I knew generally where it was, but I found it. I had talked to Detective James Pruitt,

[56]

who was the principal investigating officer. At the time I went to the scene the glass was still on the road. The area that had been disturbed along the shoulder where the car was resting when the officers found it was available.

So, I did make a survey of that scene. I went to the home that's closest to this occurrence. I talked to a Mrs. Buff, whom I had known. She knew nothing about it, except she heard the shots. That was the extent of my on-scene investigation.

MR. BYRD: If it please the Court and counsel, the Clerk apparently inadvertently did not present the total record of the proceeding. It was called to my attention. And this ought to be part of the marking, whatever that number is.

CHAIRMAN McMILLAN: The Court record is marked As Court's Exhibit 3 consisting of two folders, 76-CR-3682.

MR. BYRD: And we would ask you inquire of the Clerk if this is part of the —

CHAIRMAN McMILLAN: (Interposing) You're now handing me a folder entitled "Exhibits, August — August 30, 1976," two case file numbers listed, one of which was the one read, 76-CR-3682. The other

[57]

is 76-CR-3865 which is the other folder, *State versus William Harbison, Jr.* Also are what appears to be the court reporter's notes.

MR. JOINES: That's right.

CHAIRMAN McMILLAN: All right, sir. We will include those in the file.

MR. BYRD: Thank you.

Q. (Mr. Byrd) I hand you a folder which is part of the official record of *State versus Harbison* and Court Ex — part of Court Exhibit Number 3, Mr. Mc Murray, and ask you if those pictures and all those exhibits in there were introduced in the trial of *State versus Harbison*?

(Counsel hands documents to witness who peruses same.)

A. Yes, sir. The photographs — I don't need to give the number — that are in this manila envelope were introduced by the State as exhibits.

The diagrams made by Detective James Pruitt, which are marked State's Exhibits 22 and 19, were introduced by the State, and two other documents I think that have no particular bearing.

CHAIRMAN McMILLAN: Do you offer those?

MR. BYRD: Yes, sir. Well, they're already offered. I believe the — the Bar counselor, I

[58]

believe, offered them. I just want to be sure that the Commission saw them.

CHAIRMAN McMILLAN: All right.

A. These envelopes are the plastic envelopes that the various bullets and such as that were originally in at the time received in court.

Q. Did you appear at the preliminary hearing for Mr. Harbison?

A. Yes, sir.

Q. Did you interview Mr. Harbison at length prior to the preliminary hearing and subsequent thereto?

A. Yes, sir.

Q. Did Mr. Harbison write out for you on a yellow pad what he had to say about this incident?

A. Yes, sir, at my request. I told him to write in detail what had occurred, and he did that and delivered it to me.

Q. I hand you a yellow pad and ask you if that is a yellow pad?

A. Yes, sir.

Q. Review it and ask you if that is the signed statement by your client, William Harbison, Jr., that he wrote out and gave to you that you just referred to?

[59]

A. Yes, sir.

MR. BYRD: I'd like to have that marked for — number — Defendant McMurray's number four.

(DEFENDANT'S EXHIBIT A,
McMURRAY HEARING,
MARKED FOR IDENTIFICATION.)

Q. (Mr. Byrd) Will you read the first sentence, and these pages are not numbered, about page eight if we count front and back. Some are written on the front and back, are they not?

A. Yes.

Q. Read that.

A. "I came on down the road because I thought she was just clowning around but all of a sudden she hit her brakes and I had to jam on mine to keep from running into her and she pulled off and I lost control of my car but managed to hold on to it."

Shall I proceed?

Q. No, sir.

MR. BYRD: We now offer this exhibit in its entirety into evidence.

[60]

CHAIRMAN McMILLAN: Any objection, Mr. Lunsford?

MR. LUNSFORD: Yes. This exhibit was not listed on the pretrial order and I haven't seen it.

MR. BYRD: You may see it, sir.

MR. LUNSFORD: And it appears to be a lengthy document.

CHAIRMAN McMILLAN: While you're — go ahead and examine it. While you're doing that, what did you tell me these were, Exhibit 17A?

MR. BYRD: I didn't tell you anything, sir. Mr. McMurray —

THE WITNESS: (Interposing) Those were the exhibits that had the bullets and various other things that related to the — from hands — results from a paraffin test, I believe, and such as that. And when they were found in the Sheriff's office, the bullets were not in there. That's the form in which they were found.

CHAIRMAN McMILLAN: All right. But they're now blank — or empty.

THE WITNESS: They're empty.

CHAIRMAN McMILLAN: Empty. All right. I

[61]

just wanted the record to show that they were turned over to us empty.

THE WITNESS: That's correct.

(Mr. Lunsford reviews Defendant's Exhibit 4.)

MR. LUNSFORD: All right. Thank you.

MR. BYRD: We offer this into evidence.

CHAIRMAN McMILLAN: Any objection, Mr. Lunsford?

MR. LUNSFORD: We think it's irrelevant.

CHAIRMAN McMILLAN: All right. It's admitted.

Q. (Mr. Byrd) Mr. McMurray, would you just tell us rather succintly the matters that you did do after you were employed in preparing to defendant Mr. Harbison on first degree murder and assault with a deadly weapon, inflicting serious injury with intent to kill which were consolidated for trial, just the — succinctly tell us what you did as a lawyer?

A. I interviewed the officers; there were several officers involved. Basically James Pruitt was the detective. I obtained — I asked — I interviewed Mr. Harbison, and I talked with his family. I asked him to write this statement to give me while things were fresh in his mind, all

[62]

the details that he could remember at that particular time. I went to the scene. That's basically what I did insofar as talking to witnesses. After Mr. Fuller got in it, we met on one occasion at the Holiday Inn.

He was very interested in the tire. We discussed that. He was also interested in whether or not in following a car on this road one could ascertain whether or not the car was occupied either by one or two occupants.

And, so, we got out on the country road with someone driving a car ahead of us and he and I were in the car behind; and we were travelling the road at the speed we thought that they would by travelling, at the distance that we ascertained they were following to determine if he could have determined whether or not there was a driver or a driver and an occupant.

We had interviewed a good many witnesses. I had obtained a list of about twelve (12) potential witnesses that knew him. He had worked at one of the State units, the prison department. I think I had gotten his work record and what his reputation was.

[63]

I talked at length with his father and his mother. They were very concerned about his involvement. And Jim Fuller and I talked by telephone and corresponded prior to trial.

And I think — I think Mr. Fuller is correct that he

was there on Sunday before the trial, and we worked on it constantly from that date until the trial time.

Q. Did you do some research?

A. Yes, sir. We basically studied the law of self-defense and laws that applied to a homicide occurring in the heat of anger, the heat of passion. What effect a homicide as a result of panic would be. And the general law of homicide.

Q. And you were reasonably familiar with those laws already, were you not, sir?

A. Well, I don't know that studying that I really ascertained anything I had not been exposed to. And to this day — I don't know anything to this day about this case that I did not know in April of 1976.

Q. Nothing knew developed —

A. (Interposing) They've surprised me with some of the things they've said. I didn't know what — some

[64]

of the comments that have been made in this grievance. I — those things have surprised me..

Q. Did you at your client's suggestion ask Judge Friday to permit you to withdraw?

A. I received the information that Jim Fuller had been employed by the family. I cannot say whether or not that was a tentative employment or not. I made a note in my record that there had been a statement made to me that he was going to be employed and that I would be requested to withdraw; and I told him I'd be very glad to withdraw and would have been.

Q. Is that your usual practice when a private lawyer is employed and you're court appointed to —

A. (Interposing) This is the only time that I've ever been required to stay in a case after private counsel — that I can recall, after private counsel has been employed.

Judge Friday declined to allow me to withdraw, and that settled it.

Q. Did that declination by Judge Friday have any effect whatsoever upon your dedication to your client in defense of his case?

A. No, sir

[65]

Q. In the trial of this cause, did you represent Mr. Harbison to the best of your legal ability?

A. Yes, sir. And I was very — I was satisfied with what we had done in retrospect; as I look back today I do not know — and so many cases you try and you realize you've made a mistake, you've left out something or that you should have proceeded in a different fashion.

Today I cannot write a scenario or a record and say that I should have done this or should have declined to do this, because the verdict was as much as any reasonable attorney could expect. Because we were down to rock bottom; we were down to where you were dealing with reality and you have to — when you get in the trial of a case like this, there comes a time when you've got to make a tough decision, to leave the dream world about what you may hope may occur.

And after eight years I cannot come up with a different position — and if I have an opportunity I can explain my position — that I should have taken a

different position in this case if I was going to seek what I thought — what I considered in my best judgment was the best for William Harbison.

[66]

I can't say that about every case, because there are cases when I get through with them things have gone quite to the contrary to what I thought they would go. I realize I've made mistakes — and I'm not saying we didn't make mistakes in this case — but the result — the development of this case was as good as any reasonable attorney can do.

Now, whether you pick out the finest attorney in America and say he could have cleared William Harbison, that's — that's a dream world; that's fantasy; that's hope. And we are dealing with reality.

Q. Was he being tried under the felony murder rule as well as premeditation and deliberation?

A. Mr. Greene had indicated to us that he would try this case on the basis of premeditation, first degree, based on malice, second degree or manslaughter. I had been involved in a case with Judge Friday; I knew he would — in all probability — submit the felony murder.

We had a conference at the bench and he — we discussed the fact that the State and I had understood that we would not proceed on felony

[67]

murder. Judge Friday said that was his decision, as it was. He then told us that he would submit the felony murder as the first issue and would charge the jury that they must consider this issue first.

If they answered that first issue "yes", that would complete the homicide trial.

Q. That would be first degree murder?

A. That would have been first degree murder.

Q. And then did he tell you the second issue he was going to submit would be first degree murder on premeditation and deliberation?

A. Yes, sir. And they're on second sheets. He gave the jury the sheets. Felony murder and then premeditated murder and then down the line second degree manslaughter, involuntary manslaughter or not guilty.

Q. After Judge Friday would not admit the tire, did you have any evidence other than the — whatever the defendant Harbison testified himself or self-defense?

A. May I answer that not directly? I'll come to a direct answer. The tire was basically Mr. Fuller's idea. That, in my recollection, is the only

[68]

injection — the only different method of proceeding that was involved in this case when he got in the case. I do not place as much importance on the tire as he seemed to by his testimony yesterday.

The physical evidence in this case — and you can't get away from it — according to Mr. Harbison's own testimony was that after a pursuit of some five (5) miles — and even in his testimony at rather high rates of speed, because he said rocks were being thrown against his car and such as that, stopped his car on this remote rural road twenty-five (25) to thirty (30) feet in front of Danna Franklin's car.

The glass shows that she was on the right-hand side of the road at that time. These pictures show that

when the car accelerated it stopped some twenty-five (25) feet distant from where she originally had been stopped by him completely off the road.

Q. That's as far as it ever travelled, according to the State's evidence?

A. And the pictures show that. And the glass shows it. The location of the car shows it. The pictures show

[69]

where the highway sign was on the Jamestown Road to show that — you fix the location of it. And there is no way physically that you could have told a jury that she was going down the center of the road to try to run over somebody. And that's — you've got to consider the fact that she had testified, emotionally. We had to stop the trial two times..

Q. Was her eye shot out?

A. And she was sitting there with an opaque eye. They had put a glass eye in that was a temporary eye that was opaque, white. Seated there and said to him, in effect is how she testified, you didn't give us a chance. We were trying to get around you and you shot us point-blank, and the car was stopped some twenty-five (25) feet from where the glass was.

And there's no way, not physically, unless he positioned himself in front of the car. He got out on the left-handed side of the car and walked back, and she had driven the car trying to go around him. The physical evidence showed it. These diagrams show it. The pictures show it.

You just couldn't convince a reasonable jury

[70]

or any jury that she tried to run over him on that particular occasion.

So, I don't lay a great deal of stress on the tire. It would make no difference to the jury whether the tire is in evidence or not. It didn't get in. But when the tire didn't get in, the only evidence we had of self-defense was that he said she tried to run over him.

He wasn't struck. At most that was a nonfelonious assault. You can't — you can't stretch it any farther than that. You can't — you can't get to any conclusion but what he was the aggressor. And by driving and stopping her on a remote country road at twelve o'clock at night, getting out of a car with a gun either in his belt or in his hand — she said in his hand; he said in his belt — she would have had the right to exercise whatever force was necessary to protect her life, even running over him.

But she didn't do that. She went to the side. He was the aggressor. You can't get away from the fact that he used excessive force. And here in this courtroom today you can't understand it, but when the Solicitor is talking about firing

[71]

three shots — not one — one, two, three at point-blank range in the backs of two people as he did. One shot in Morris Hardy's back right in the middle and came out right at his breast bone. She was hit in the back. Unarmed. He was in no danger — never said he was in any danger.

The car was going by him when he shot. He shoots in a side window three times, kills a man, puts the girl's eye out and flees the scene.

And this man dies there in front seat with this little

girl with her eye so damaged that she's in shock. And then come and say that you could manufacture self-defense out of that and get up and enthusiastically argue to a jury to turn him loose. There isn't any jury that would have said we're going to set him free and let him walk the streets again.

And Mr. Fuller talks about possibilities. There is — sometimes when you've got some emotion on your side that the jury might take the facts and come down to a lesser degree or acquit somebody because of a peculiar reason. The flow was the other way on this occasion because you still had a living participant in that tragedy.

[72]

With that girl sitting there telling his story with her injury apparent, telling how she tried to flee him after he'd followed her for five miles, saying that he needed a gun to go back when he thought that just this little girl weighing a hundred pounds was in the car and he needed a gun in his hand or in his belt to go back to protect himself, to expect a reasonable jury to think that he needed that for his self-protection is beyond credulity. You're in the — you're in the wishful stage; you're in the dream world.

And that didn't occur on this occasional because the hard reality was that he left a man to die there on that remote country road with a girl in shock and fled the scene.

Q. And did the Solicitor tell you that he was going to try him for first degree murder?

A. Mr. Greene never made us any offer. He wouldn't make us an offer. He just would not talk about any lesser plea, never did.

Q. All right, sir. Now, when Mr. Fuller argued to the jury, were you there?

A. Yes, sir.

Q. Had Mr. Larry Jacobs, who is now deceased, opened

[73]

as a Pros — one of the Prosecutors?

A. He did.

Q. Do you have?

A. (Interposing) I've got my notes over there in my thing.

Q. I'm handing you a bunch of legal pads and many, many pages, and ask you if those were your notes that you kept during the trial of *State versus Harbison* —

A. (Interposing) These are some of the notes.

Q. — or at least a part of them?

A. Yes, sir.

Q. Does a section of them have the jury argument?

A. Yes, sir.

MR BYRD: I'd like to have marked as D-5, am I correct — five yellow sheets. And would Your Honor permit me to tear them away from the other portions of the notes?

MS. BRYANT: Are you admitting the whole thing or —

MR. BYRD: (Interposing) No.

CHAIRMAN McMILLAN: You're offering the five —

MS. BRYANT: —just the five yellow sheets?

CHAIRMAN McMILLAN: —pages?

[74]

MR. BYRD: (Nods affirmatively.)

CHAIRMAN McMILLAN: All right.

Q. (Mr. Byrd) Now, after Mr. Jacobs argued, could you just give us the thrust of his opening argument?

A. He would have argued only for first degree. And his argument would have been based on a pursuit for this five-mile distance that Mr. Harbison was pursuing because of the fact he had been associated with Danna Franklin for two years and that he stopped them on this rural road about midnight; and that he got out with a loaded pistol in his hand.

When she saw the pistol she tried to drive around the car; that he discharged it five times, three times in the window; that he killed Hardy and wounded Danna Franklin; that without staying to see if he could render any assistance to help anyone he fled the scene; that he came back and that he told the officers that he happened upon the scene and saw these people in trouble and, for that reason, brought Danna Franklin to the hospital; that he did not make any statement about it implicating himself for several days; that the — Danna Franklin was unarmed; that Morris Hardy was

[75]

unarmed; that he was never in any serious peril himself; that he fired point-blank at them; and that it was by his — by his own testimony that he had

testified that he fired into an occupied car and was guilty of felony murder..

Q. Then did you observe the jury and look at them during Mr. Fuller's argument?

A. Yes, sir.

Q. When Mr. Fuller argued — if he did argue — for total acquittal, as he said he did, tell us, as you saw it, the reaction of the twelve jurors and the alternates in this case.?

A. I knew several of the jurors — I can remember two in particular; one of them is here today — whom I had known for twenty years. Another one was John Gathings who was — operated a store there.

I don't think that anybody can look at a jury and be positive, but you can determine whether or not they are attentive, whether or not you feel — get a feel that you're making headway with them. To argue to this jury that you can shoot a man — to argue to the jury on that occasion as he did that you can shoot a man in the back who is unarmed after pursuing him for five miles, leave him there

[76]

to die and then have them introduce pictures into evidence showing a hole in his back and have her tell how she, when the shot hit her, it knocked her up against the car and how she was out there wandering that road and trying to search out some help and couldn't find any. The jury was passive.

No jury gave it a second thought in my opinion.

Q. That's how you perceived it sitting there as trial counsel, wasn't it?

A. And subsequent events have indicated, as one of them sought me out —

MR. LUNSFORD: (Interposing) Objection.

Q. (Mr. Byrd) Let's don't go to that yet?

A. All right.

Q. Now, you have your notes there of the jury argument that you made prior to making the argument, do you not?

A. Yes, sir.

Q. Can you tell us the — and you may review your notes to refresh your recollection — the thrust of your jury argument? And have you reviewed those notes —

A. (Interposing) Yes, sir.

Q. — carefully?

[77]

A. Yes, sir. In the court situation on that day, we were faced with the — if we were going to be of any benefit — if I was going to be of any benefit to William Harbison, I had to try — and I don't know how persuasive lawyers are; we may be or we may not be to jurors — but I had to do something to get the jury to take this top sheet on felony murder and lay it aside and consider whether or not he was guilty of murder under these other issues that were being submitted.

Q. Of premeditation and deliberation?

A. On down the line. That was a requirement or we did him no good. I was convinced that we had no plea of

self-defense that a jury would buy. We had no factual plea of self-defense. We had no legal plea of self-defense.

I concluded that you had to say something to the jury in some way to get them to consider a lesser included offense. I didn't argue that he was convicted — that he should be convicted of anything. The import comes through that way. My argument — the thrust of my argument was that he should not be convicted of felony murder or first degree murder or second degree murder. That was

[78]

the approach that I took.

My first part of my talk was to indicate that William Harbison had a good record and a fine family; that he had been caught up in this situation — Danna Franklin was a — was a daughter of a broken home. She lived with an alcoholic father. She found friendship in the Harbison home. They befriended her.

And my point was to point out that there was no bitterness toward her. There had been nothing but friendship. But they got caught up this night in this unusual situation that he did not foresee because she had told him she was going to take a bath that night and go to bed and then later on he had observed her with this man; that he pursued her, and that when he stopped the car, he had no intent to harm anybody. He got out with the pistol wherever it was; that in that remote situation he did not know who might be in the car or that they might be armed and, therefore, he — he took the pistol for his own protection; that when she did accelerate the car, he panicked, and when he — when the car went by him that it wasn't — he was

not firing for the purpose of — of killing anybody, it

[79]

was through panic; and that he discharged the gun in the car through panic and that at the most this would be a homicide resulting from the heat of passion, from anger suddenly aroused, from emotion.

Mr. Greene in his argument discussed emotion, I think. But that was the thrust of — of my argument, and tried to buttress that with the idea that when he left the scene that night he could have fled the scene, and it may well be that no one would have ever known that William Harbison was the perpetrator of this criminal offense. But he came back.

And I think I tried to make a big point of the fact that it showed that he had no intent because he came back to the scene and that he then rendered assistance to her by taking her to the hospital; if he hadn't taken her, she'd have died out there on the road.

I've got notes here that maybe he — that was — that quality in him that brought him back that night was his mother's training. Maybe it was human decency. Maybe it was affection for Danna Franklin. I argued about the fact that the tire — that the State had the obligation to bring the tire

[80]

and they did not do so.

I argued the fact that you could not believe Danna Franklin, because Danna had testified that she had not had an abortion; she had had an abortion. I argued that she was not worthy of belief because she had falsified that evidence.

I argued that she also falsified the fact that this was a continuing relationship and she was ashamed to admit that she was continuing to go with him; and,

therefore, she said they had broken off a year ago, which was — which was not the case.

That there had been no malice in this case. It's not a case of second degree, because he had no malice against Danna Franklin. The State had hardly mentioned Morris Hardy, and they showed no malice involving Morris Hardy; that the State was purely using emotion to try to arouse their — their feelings against him because of the fact that Danna Franklin who was there, obviously injured.

I argued that it would not be justice for him who had throughout the day been just doing routine things and all of a sudden faced with this kind of situation, acting on the spur of the moment, no anger toward either of these parties; that he

[81]

fires in panic; that it would not be justice for him to be convicted of first degree murder or second degree murder.

And at some point in the argument I said, you're going to find guilty — or you may find him guilty of some criminal offense. I cannot quote my words precisely. You may find him guilty of some criminal offense; you will find him guilty of come criminal offense, but you should not find him guilty of any offense greater than manslaughter.

Q. Had you written out any argument to the jury?

A. No, sir. I wrote these notes, and I can't tell you whether I wrote them at the noon hour or whether I wrote them the night before. I did not stand up with these notes in my hand. I —

Q. (Interposing) You never do, do you?

A. Well, I'm not a very good detail person to itemize, at three o'clock — the car drove down the road at three-fifteen; I just don't do that — for well or evil, I don't know.

Incidentally, I might say that the jury came back after deliberating some period of time — not long — and asked Judge Friday, are we entitled to take this first issue —

[82]

Q. (Interposing) That was the felony murder?

A. — that's the felony murder — and lay it aside and consider the other issues, which is what I had undertaken to persuade them to do. And Judge Friday said, of course, you can do it; and they went back and —.

Q. (Interposing) And he let them go home for the night, I believe, in the mean — no, —

A. (Interposing) No, sir.

Q. — they came back on Saturday and asked that question, didn't they?

A. No. They asked that question as they went out. They had not been out very long and came back and asked that. No. He — he held them that night in the Holiday Inn, I think.

Q. And then did they reach a verdict on Saturday morning, then, is that correct?

A. No. They reached a verdict, whatever day it was, late in the afternoon. The verdict was reached at five or six o'clock on the afternoon.

Q. Mr. McMurray, I want to ask you this. Did you, sir, intentionally fail to seek the lawful objectives of William Harbison, Jr., your client, through reasonable available means permitted by law in this

[83]

trial?

MR. LUNSFORD: Object.

CHAIRMAN McMILLAN: Overruled.

A. The answer is yes. In this particular case, if I had not been in the case —.

Q. (Interposing) Let me be sure you understand my question. I don't believe you understood it. Read it back, please?

A. The answer as the question is phrased is "no".

MR. LUNSOFRD: Motion to strike.

CHAIRMAN McMILLAN: Denied?

A. In this particular case —.

Q. (Mr. Byrd) (Interposing) You may explain?

A. —if I had not been in the case making the argument to persuade the jury to move from felony murder, William Harbison would have been convicted of first degree murder. In addition to that — now, you lose sight of the fact that he was charged with assault with a deadly weapon with intent to kill, inflicting serious injury on Danna Franklin which he was guilty of on his own statement.

She was seriously injured. He had fired in the window. He had killed Morris Hardy. The jury cut that to a ten-year felony. And I don't believe

that — no matter how skillful or how silver one's tongue is — that they could have argued self-defense —

MR. LUNSFORD: (Interposing) Objection?

A. — and persuaded the jury to have reduced it from first degree to second degree and from a twenty-year to a ten-year felony.

CHAIRMAN McMILLAN: Overruled.

MR. LUNSFORD: Motion to strike that as speculative.

CHAIRMAN McMILLAN: Denied.

Q. (Mr. Byrd) Did you, in your opinion, give your client your best skill, your best judgment as a lawyer in this case?

A. The answer is yes. We worked hard on this case. Mr. Fuller is right; this was not an easy case. It — it was something that you do the best you can on.

Q. All right.

A. I was never displeased with the verdict.

Q. What was the reaction when the verdict of second degree came in?

A. There was a — an acceptance, a relaxation —

MS. BRYANT: Whose reaction are we talking

[85]

about?

CHAIRMAN McMILLAN: By whom? Who are we talking about?

A. We're talking about the audience, I presume, the audience that was there in the courtroom. The courtroom was filled, a lot of people in the courtroom.

I was relieved. I took the position that if they would have returned — the jury would have returned a verdict of manslaughter, that would have been beyond any reasonable expection.

Q. What —?

A. (Interposing) At that particular time — Mr. Fuller talked about sentence — there was no way for me to know what Judge Friday was going to do. He didn't know what Judge Friday was going to do.

Q. (Interposing) All right. Let me leave you right there a minute?

A. All right.

Q. What was the reaction, if any, of Mr. Harbison when the jury found him guilty of second degree murder and found him not guilty of first degree murder?

A. I can't remember any — he certainly didn't object to it. He had gotten off from a sure life sentence.

[86]

There was no — he never spoke to me in a critical way about any of the trial..

Q. Did he ever speak to you at all about your jury argument, Mr. Harbison?

A. No, sir.

Q. Has he to this hour ever spoken to you?

A. (Interposing) Not directly.

Q. The first time you ever heard of this was in copy of an interrogatory in the spring of '84 in the post-conviction hearing?

A. I think that's correct, yes.

Q. Mr. Fuller sent you a copy of his response, is that correct?

A. Yes.

Q. During seven and a half or eight years, did anybody ever say anything to you about your jury argument in the defense of William Harbison, jr.?

A. His mother wrote me a letter thanking me. I've got that note

MR. BYRD: Mark this, Madam Reporter—Madam Clerk.

(DEFENDANT'S EXHIBITS 5, 6 AND 7, McMURRAY HEARING, MARKED FOR IDENTIFICATION.)

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[87]

Q. (Mr. Byrd) I hand you an exhibit marked Defen-

dant's Exhibit Number 6 and ask you if it's addressed to John McMurray, Attorney, Ervin Building, Morganton, North Carolina? (Counsel hands exhibit to witness who peruses same.)

A. Yes.

Q. Does it have a postmark, by chance, on it?

A. Glen Alpine.

Q. Does it have a date, something '77?

A. December 9, 1977.

Q. Was that after the Opinion of the Supreme Court had come down and Mr. Harbison shortly prior to that time had been brought to the Superior Court to have his life sentence imposed?

A. I'm sure that is, but I don't remember the precise time of the —.

Q. (Interposing) It will speak in the record, won't it?

A. Yes.

Q. Will you read that to the panel?

MR. LUNSFORD: Objection. That's hearsay.

CHAIRMAN McMILLAN: Overruled. Go ahead.

[88]

A. (Reading Defendant's Exhibit 6) "Dear Mr. Mc Murray Thank you for trying to help William Jr. the pressure have been great but being colored the cards are stack against us before Court even starts Thank

you so much" It's signed here Margaret Harbison; then over on the right it says "to someone specially thoughtful — YOU! Margaret & William Harbison"

MR. LUNSFORD: Motion to strike.

CHAIRMAN McMILLAN: Denied.

Q. (Mr. Byrd) I hand you Defendant's Exhibit Number 7 and ask you if you responded on November the 10th — or error — December the 10th, '77 and, if so, will you please read that to the panel?

(Counsel hands Exhibit 7 to witness who peruses same.)

A. Yes, sir. I haven't seen this letter for eight years. It's the first time I've seen it.

Q. You turned your file over to me when you hired me, did you not?

A. Yes, sir, without reading it.

This is dated December 10th, 1977. "Mr. and Mrs. William Harbison, P.O. Box 724, Glen Alpine, North Carolina 28628 Dear Mr. and Mrs. Harbison: I ever much appreciate your note received this date. The Opinion has been filed in the office of the

[89]

Clerk of Superior Court however I have not received it in the advance sheets. I have read the Opinion.

"If you should want to read this Opinion if you will let me know I will make you a copy of it when received.

"I feel like we did about all that could be done in this case and I felt that the reduction from first degree to the second degree and from the 20 year to the 10 year

assault was satisfactory as far as we were concerned. Our problem was the severity of the sentence and North Carolina follows this rule that this is not reversible error as long as this is within allowable limits.

"I do believe and hope that the fact that William was convicted of second degree rather than first degree will be of substantial benefit to him with reference to the time he will be required to serve and other prison rights and benefits.

"Yours very truly, John H. McMurray."

MR. BYRD: We offer that into evidence.

CHAIRMAN McMILLAN: It's admitted.

MR. LUNSFORD: What number was that?

MR. BYRD: Seven. You may examine him.

MR. LUNSFORD: May I have a moment, please, sir

[90]

CROSS

CHAIRMAN McMILLAN: Five-Minute recess.

(SHORT BREAK: 11:20 — 11:32.)

CHAIRMAN McMILLAN: All right. We're back in session. Cross-examination.

CROSS-EXAMINATION BY MR. LUNSFORD:

Q. Mr. McMurray, prior to making your closing argument, you did not discuss what you were going to argue with Mr. Harbison, did you?

A. No, sir. I discussed it with Mr. Fuller.

Q. You did not discuss it with Mr. Harbison?

A. No, sir.

Q. And he did not authorize you to suggest to the jury that he should be convicted of manslaughter, did he?

MR. BYRD: Object to the form of the question.

MR. LUNSFORD: This is cross-examination.

CHAIRMAN McMILLAN: Well, overruled.

A. He did not suggest to me anything. We discussed various defenses. Had we been relying on self-defense alone, we would have plead not guilty by reason of self-defense. We surely had no intent at

[91]

any time to abandon the possibility of manslaughter based on killing in the heat of passion.

Those — those defenses were discussed. We would have been very foolish to have said — under this evidence — that we'll rely only on that very narrow, vague, faint, ephemeral possibility of self-defense.

Q. Let me ask you one more time, Mr. Harbison. Did he ever authorize you to suggest to the jury he should be convicted —

CHAIRMAN McMILLAN: (Interposing) It's Mr. McMurray.

MR. LUNSFORD: Excuse me?

CHAIRMAN McMILLAN: Mr. McMurray.

Q. (Mr. Lunsford) Mr. McMurray. I beg your pardon. Did Mr. Harbison authorize you to suggest to the jury that the jury should convict him of manslaughter?

MR. BYRD: Objection.

CHAIRMAN McMILLAN: Overruled.

Q. (Mr. Lunsford) Your answer is?

A. No, sir.

Q. Do you recall receiving the letter of notice from the Grievance — from the Chairman of the Grievance Committee which has been identified and introduced

[92]

into evidence as the Plaintiff's Exhibit Number 1, do you not?

A. Yes, sir.

Q. And attached to that was an item identified as the Substance of Grievance in which the allegation of Mr. Harbison were summarized?

A. Yes, sir.

Q. And you admit receiving that?

A. Yes, sir.

Q. And as was your duty under the rules of the State Bar, you responded to that letter of notice and the allegations contained in the Substance, did you not?

A. I did.

Q. And your response was contained in a letter to Rivers D. Johnson, Chairman of the Grievance Committee, dated September 1st, 1984, was it not?

A. If the date's correct I responded.

MR. BYRD: Let him see it if you don't mind.

MR. LUNSFORD: Yes, sir. I'll be happy to.

(Counsel hands exhibit to witness who peruses same.)

Q. (Mr. Lunsford) this was the Plaintiff's Exhibit Number 2. That letter, Plaintiff's Exhibit Number 2, was your response to the Letter of Notice, was

[93]

it not?

A. Yes.

Q. And on page five of that letter you signed the letter?

A. Yes, sir.

Q. And under the rules of the State Bar, it was your obligation to make a full and fair disclosure of the facts and circumstances pertaining to those allegations was it not?

A. Yes, sir.

MR. BYRD: Objected to.

Q. (Mr. Lunsford) Did you understand — excuse me.

MR. BYRD: That's a matter of law.

CHAIRMAN McMILLAN: Read the question back. I'm sorry.

(QUESTION READ: PAGE 93, LINES 7-10.)

CHAIRMAN McMILLAN: I don't understand the question, so I'll sustained the objection.

MR. LUNSFORD: That's probably poorly phrased. My appologies.

Q. (Mr. Lunsford) In responding to the Letter of Notice

[94]

Mr. McMurray, did you attempt to candidly and truthfully explain what had happened in this connection, your actions?

A. Yes. In a limited fashion, I — to the questions asked, yes.

Q. Let me direct your attention to page four of your letter, to the second full paragraph beneath your sub — subparagraph four (4), "Statements to the jury." Would you please read that to yourself.

A. I've read it.

Q. Have you had that opportunity?

A. (Nods head affirmatively.).

Q. Now, Mr. McMurray, let me also direct your attention to the first full paragraph on that page — I'm sorry — would you please read that?

A. (Reading document) "On the homicide charge I stated to the jury that on this evidence ! was of the opinion defendant would be convicted fo some criminal

offense, but he should be found guilty only of manslaughter."

MR. BYRD: We object for the reason before that we objected that nobody should be able to reconstruct the jury arguments except Judge Friday.

CHAIRMAN McMILLAN: All right. Overruled.

[95]

Q. (Mr. Lunsford) And reading down further on that page, isn't it a fact that you made the following statement in your letter: "I knew some of the jurors and believed that they would take a realistic view of this case and as a consequence I determined that it was necessary to try to persuade the jury to pass the felony murder issue and then not convict the defendant of either first or second degree murder but rather that the fair verdict would be manslaughter."

Was that your statement in this letter to the Grievance Committee, sir?

A. Yes.

MR. LUNSOFRD: We have no further questions.

REDIRECT

REDIRECT EXAMINATION BY MR. BYRD:

Q. Now, would you explain the two paragraphs of your letter that you sent back to the Bar? And I'll ask you before you explain if you had reviewed your file or your jury notes at the time you responded?

A. I did not review the file on response. I was naive, I suppose, in thinking that there was a focus

[96]

on me that — moving toward censure. I wrote that, sir, to the best of my recollection.

I had not thought at the time that I would be required to make exact quotes. To this day I cannot, word for word, state what I said. I can't honestly say whether I said — whether the word opinion has some bearing or not in the final outcome in this case; whether I said you may convict him, you will convict him, I am of the opinion you'll convict him, the — I never said as he suggested that he should get time. That was not the thrust of my argument.

I was trying to honestly indicate to the Bar that I had taken the position that we did not have a self-defense plea and that the only way we would by-pass felony murder was to get the jury to consider the degrees of murder.

And that I — and I did make a statement; but to say that I can quote that verbatim today is beyond my ability. I remember a lot of things as this matter has come up and I — if this transcript of my argument to the jury is ever found, I feel sure that a statement with that import is in it.

Whether I ever alluded to it at another time,

[97]

I don't know.

I'm sure there were some — there may have been later on in the argument that — my notes say that first degree would be a harsh unjust verdict, and I may have alluded at that time that they should not find him guilty of more than manslaughter.

Q. And in your inquiry from the Bar, this was the fourth or fifth inquiry; there's numerous inquiries about not

going to the scene and not protecting the tire and many things; this is just a portion of a long letter that the plaintiff's counsel asked you about, isn't it?

A. Yes. I — I didn't — again, I didn't think, you know, that — think that one element was more serious than the other. The fact that I hadn't gone to the scene, Mr. Fuller makes that statement; that statement is not correct. I don't know how or why he made the statement. It just is not correct.

I never told him that. Apparently, he relies on Harbison for that purpose.

Q. Because you do know you went, don't you?

A. Well, I went, and I remember going; and I would not

[98]

have told him I did not go.

Q. After you employed our law firm on or about the 28th of December, 1984, did you and your counsel make a diligent search for the jury transcription of the argument — the transcription of the jury arguments?

A. I have. I've been through all the exhibits in the Burke County Courthouse which were in a manila folder with the name of the defendant on them..

Q. Did you go through them with the court officials?

A. I went with the assistant clerk.

Q. Were they locked up in a room somewhere?

A. They were — yes. They were in a safe type room to which the clerk has a key. We also went to a storage room upstairs on the main — on the — where the

courtrooms are and searched there in some boxes that were there.

We went to the Sheriff's office and found — found the Sheriff's file of this case, but did not find any notes.

Q. Did you find notes of the trial? I hand you a part of the Court Exhibit, the number I do not remember.

MS. BRYANT: Court Number 3.

[99]

CHAIRMAN McMILLAN: Court three.

Q. (Mr. Byrd) Court three. — and ask you if you found those in the records —

A. (Interposing) I did not — I did not personally find these, no.

Q. You did not find those? All right?

A. Those were — those were found by someone else.

Q. All right, sir. I hand you Defendant's Exhibit Number 2, which was a letter from the Court Reporter Clara T. Cline dated January 6, 1977 and ask you to read that. That was identified by Mr. Fuller.

(Counsel hands exhibit to witness who peruses same.)

A. This is addressed to me dated January 6, 1977. (Reading document) "Mr. John McMurray, Attorney At Law, Morganton, North Carolina Re: *State versus William Harbison, Jr. Transcript* Dear Mr. McMurray:

"Enclosed is the first section (237) pages of the transcript of the trial of *State versus William Harbison, Jr.*

"Please accept my apology for the delay in getting this to you. Since I began typing on the transcript, several things have come up to prevent me from being able to work on the transcript

[100]

as I hoped I would be able to.

"The remainder of the transcript, in my estimation, will be approximately 350 pages, and I cannot say at this time when it will be completed; however, I shall work on it as much as I possibly can. For the next several weeks I will be in Court, so therefore, my typing time will be limited.

"By a copy of this letter to Mr. Fuller, I would like to inquire of you and him as to whether or not I should type the arguments of the attorneys to the jury. Unless I hear from either of you, I will not type the arguments, since it is customary—since it isn't customary to type the argument unless requested to do so.

"If either of you have any questions regarding the transcript, please do not hesitate to get in touch with me.

"With kind regards, Sincerely yours, Clara T. Cline, signed 'Clara Cline', "with a carbon copy to Mr. James Fuller.

Q. Did you request that the jury arguments be typed?

A. No, sir.

Q. Did Mr. Fuller ever suggest to you that the jury arguments be typed?

[101]

A. No, sir. He never suggested that and never suggested anything about the jury argument. I — I never can recall any critical comment about the jury. I was as close to them as I am to you. I never observed — and as you're arguing you see what's going on — I never observed any colloquy between him — I'm not saying it didn't go on. But the idea of calling me a son of a bitch and thinking that that's the last time — that nobody would comment about that for eight years is hard for me to understand, particularly when him mother and father were very cordial to me.

And the courtroom was filled with his friends, because I can remember very distinctly the reaction when the verdict came out —.

Q. (Interposing) You put about twenty some of them on the stand, hadn't you, a great number of them, hadn't you?

A. There were — I don't know the number, but we put a lot of witnesses on the stand as indicated in the record, and none of his friends or relatives ever made a critical comment. The — absent critical comments, I had talked to his parents. In this —

[102]

in making up the appeal I corresponded with Mr. Fuller numerous times. Our relationship was very cordial. If James Harbison at that time was displeased with this verdict, it's beyond my credulity that they would never have commented to me.

I can't believe that my attitude to this court is so radically different from Mr. Fuller that I would have the feeling that we had done as much as lawyers could do in — in representing him, as contrasted with his

idea that he is displeased; unless he's seeking a miracle. We were as successful in defending him as attorneys of our capabilities generally are.

Q. Let me ask you this. Did you or did you not, based upon your jury notes and your best memory, say to the jury in the trial of the Harbison case, quote, "ladies and gentlemen of the jury, I know some of you and have had dealing with some of you. I know you want to leave here with a clear conscience. I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should

[103]

do some time to think about what he has done. I think you should find him guilty of manslaughter, not first degree," end quote.

Did you, sir, say that or not?

A. I did not say that. When I argued this case, Judge Friday was as close to me as Mr. McMillan is.

Q. And do you talk in a loud voice usually?

A. Well, the jury is seated like that first row there and I — in a case like this I don't whisper to them. For that reason I get back to about where the — this is — and I'm backed up to where the Judge is. So, the Judge could have reached out and touched me

Now, if you know Judge Friday, he's not going to let something go on in his courtroom that may imperil a lengthy difficult trial such as this is.

Q. Had he already stopped somebody from saying the word "liar"?

A. I was not the one that said that.

Q. I understand that. Had he already stopped someone?

A. Yes. I'm not sure who said that, and I won't make a suggestion; but I would not have suggested my

[104]

client get time. That's not my prerogative. I was trying to reduce it from — from first degree, or second degree to manslaughter; that's not my preogative. What I said, I don't know. But if I were up there making statements that would — after Judge Friday had tried this case for several days — and it was an emotional trial. It's hard to realize today as you sit in this room here the emotion there was there. And to think that Judge Friday would not have reached out and tapped me on the shoulder and told me that, Mr. McMurray, you're — whispered to me or sent the jury out —.

Q. (Interposing) That you were admitting your —?

A. — Judge Friday is not that kind of Judge. He's got no hesitance about telling me what to do in his court; that's his responsibility. And he did on this occasion. At one time I sought to put something in the record that — to preserve the fact that Mr. Greene and I had discussed it, and he said he wouldn't allow — that he would not proceed on felony murder.

Q. And what — did he admonish you what he'd do to you if you tried to put that in?

A. With — in very clear, unequivocal terms

[105]

Q. Is it in the record there what he said?

A. No, sir. It's not in the record. Were were at the bench. I got the message. Judge Friday was right. But I was — we had this tension at the time. Judge Friday was presiding, but we were pushing as hard as we could. And — and he says, you can't do that, and added a few things that let me know that I couldn't do it. And I did not do it, but we made an effort to do it.

But Judge Friday would not have permitted me to have made an argument — he, having tried many cases like this, would be obviously in error. I can't read Judge Friday's mind, but I'm satisfied Judge Friday concluded that we obtained a verdict of second degree and of a ten-year felony, that we had acted as well as attorneys in North Carolina should act and dispose themselves in the trial of a serious criminal case such as this.

Q. What happened — what was the emotion and response when Judge Friday gave Mr. Harbison life on second degree? First, what was your reaction when he gave him life on second degree?

A. Well, —

MR. LUNSOFRD: (Interposing) Objection. This

[106]

far exceeds the scope of direct and cross-examination, and I don't think it's appropriate at this point on redirect.

CHAIRMAN McMILLAN: Well, it does, but go ahead.

A. I was an advocate. I was caught up in the trial. We had done everything we could and felt like we had been successful in reducing it from mandatory life imprisonment. And I was disappointed that we did not get a term for years. But I've heard enought

sentences like that that I don't have the emotional outburst that occurred.

But the audience — when Judge Friday said I sentence you to life imprisonment, there was a murmuring in the courtroom, audible, ohhh — by numerous people. It was spontaneous.

Q. What was the air as Judge Friday was leaving the courtroom to go home from this trial?

A. The murmuring continued.

Q. Did you see Judge Friday as he went out to get on the elevator?

A. Yes, sir.

Q. Tell what occurred?

A. Well, they were in the lobby. You go from the

[107]

courtroom into the lobby and the people had come out there and were still murmuring and talking. I can't tell you what it was, but it was like a cacophony of voices talking at the same time which was a emotional reaction.

And I think that that emotional reaction occurred because we had gotten this matter reduced from the mandatory life sentence and they were given some hope and that life imprisonment struck that hope out from under them, and they were murmuring against it was they were gripped in the emotion of what had transpired.

MR. BYRD: I have no further questions.

CHAIRMAN McMILLAN: All right. Now, since

he did exceed your scope, do you have any other questions, Mr. Lunsford?

MR. LUNSOFRD: We have no further questions at this time.

CHAIRMAN McMILLAN: Do you have questions?

MR. SHERWOOD: One. Mr. McMurray, you've stated in your testimony here that you had reservations about this self-defense thing all the way. Do you have anything in your file which would indicate you wrote your client and said, I've got

[108]

reservations about this, I don't think we ought to do this, or we ought not to do this?

A. No. I did not write him any letters. Our correspondence was always one-to-one. I'm sure that he and I discussed the heat of passion; that had been my thrust of the case from the beginning.

From all the evidence he had told me about, from the — James Pruitt, the Deputy Sheriff, and the physical evidence, I felt like that was a — that was a realistic plea, something to get your teeth into, something you really could work on; but I did not face-to-face say to William Harbison, I am going to undertake to argue that you should not be found guilty of first or second degree or that the maximum verdict should be — be manslaughter.

MR. SHERWOOD: But you don-t have any letter or anything which indicates you questioned the —

A. (Interposing) No, sir.

MR SHERWOOD: — the not guilty?

A. The — Judge Friday's submitting —

MR. SHERWOOD: (Interposing) You've answered my question.

[109]

CHAIRMAN McMILLAN: Do you have any further questions?

MR. SHERWOOD: No.

CHAIRMAN McMILLAN: Do you have any questions?

MS. BRYANT: Yes. I'm concerned about — and want to hear from you — how you see your role in the adversarial process, vis-a-vis, the presumption of innocence and how that — what weight that carries and how you see your role with that weight in the adversarial process, as in the criminal trial?

A. Well, in this particular case, after William Harbison testified, it was my legal responsibility to interpret what he testified to as best I know how and take the position that most favorably deals with what his testimony showed. Because I think that if — if I am obligated in the case in which I exercise my judgment that there is not a self-defense plea that has any possibility of success, if I am obligated under those terms where the — where I conclude there is no possibility of success to make that argument to the jury, then I am in violation of a standard, if that's what it requires.

[110]

I don't see my role as the inflexible.

MS. BRYANT: Well, if there is a conflict between your interpretation of his testimony or what you see the case as being and the right of the defendant in this case to have the presumption of innocence and pleading not guilty or whatever grounds he wants to

plead on, how do you see — what is the relative weight of those two? Do you see them as being equal, one more weighted than the other or —

A. (Interposing) I can't answer of equal weight.. But a defendant cannot make the judgments on this case as to whether or not he is the aggressor — generally they have no knowledge whatsoever about what it means to be an aggressor. They have no knowledge about how it weighs — whether or not they've used excessive force. They have no knowledge about their right to use whatever force is necessary to repel an assault.

The lawyer has got to make that decision, and he cannot be bound by his client. If he is, then a trial gets to be sort of woodened —

MS. BRYANT: (Interposing) Well, after it having been — after advising a client of all of

[111]

those issues, then what has — where do you see the weight then? Who has — what has the most weight, your judgment or that client's decision of what they want to do?

A. If a client came to me and said that at all costs I want to plead not guilty, if I though that he had no — that that was an unreasonable request, then I suppose my duty would be either to withdraw or acquiesce to what he was requesting me.

I don't think as a lawyer — I don't think in good conscience, if someone says, I want you to plead self-defense, that I can plead self-defense when there is no self-defense.

MS. BRYANT: And when you feel there is no self-defense, then, how do you see the relative weight of the client's desire to plead and your feelings?

A. Well, I think it depends on whether the client has made any statement to you. Normally you do the best you can for a client, and we don't — we didn't get down in this case in which I asked him or he told me that at all costs I want to plead self-defense.

I think if he had, then I would have had to

[112]

have made the motion to withdraw on that grounds.

MS. BRYANT: So, are you saying that you weren't clear — strike that.

Are you saying that you had some notion that you had Mr. Harbison's permission to ask the jury —

A. (Interposing) I did not have his permission. We did not have any agreement. We had — we had not abandoned defenses other than self-defense. We did not discuss those with him as such.

We had no agreement that our sole plea would be self-defense. If it was, it would seem to me that we would have plead not guilty by reason of self-defense.

MS. BRYANT: Well, I guess the fair question is, how did you perceive Mr. Harbison's objective?

A. His objective was to obtain the best results possible under the evidence of this case.

MS. BRYANT: I recall you earlier saying that you did not say that he should serve some time. So, are you saying that all references to any statements you might have made that he should serve some time to think about what he had done were not true?

A. I did not make that statement. I'd be very surprised

[113]

if the record was found that I said that. I just can't comprehend making that kind of statement. I've—

MS. BRYANT: (Interposing) Mr. Fuller—

A. —never made a statement like that, never made a statement like that in addressing a jury.

MS. BRYANT: Mr. Fuller made comments about some thrust to the extent of you being between two extremes and his position being extreme. Do you recall that part of your argument—

A. (Interposing) I don't recall—

MS. BRYANT: —to the jury?

A. —that. There is in my notes a question that—something about the harshness of first degree and the middle ground. I have difficulty recalling that statement. I may well have made that. I—I can't—when you ask about saying that he should serve time, I can be unequivocal. When you ask me whether or not I said about a middle ground, I may very well have argued that, because my thrust was that we were seeking to obtain a verdict that was other than first degree or second degree.

MS. BRYANT: And going back to your perception that—or your notion and feeling—understanding that Mr. Harbison wanted the best result he could

[114]

obtain. Did you feel that from your talking to him or interviewing him any agreements that you all did make that he had given you any kind of direction as to how he—any limitations on that?

A. He did not give us any direction, placed no limitation

on it. Our discussion — I'm sure that — our approach was, do the best we could. We had no idea exactly how the evidence was going to come down.

Mr. Fuller thought he'd get the tire in; he didn't. The — I did not know — I had a general idea how Dianna Franklin would testify; but we had to see what her testimony — what effect that would have on the jury. We were, as in most cases, going to do the best we could.

MS. BRYANT: Well, do you believe that it was the defendant's right to determine in the first instance how he would plead and to determine any matters that would happen in the trial that would effect, you know, these — the plea of not guilty?

A. I don't think he has the right to tell me to argue self-defense if there is no self-defense. I guess the right at that point in time, if he insists on that, I should report that to the court and tell

[115]

the court that — that in good conscience, I don't believe I could make that argument, and ask the court to continue the case and release me from it.

MS. BRYANT: And did you believe that that was what Mr. Harbison wanted?

A. No. There had been no — there had been no discussion along those lines. We had — we had talked about heat of passion; we had talked about the tire; we had talked about the fact that he didn't have the intent. But, we were going to deal with those as best we knew how.

There's a case that's come down, incidentally, from the Court of Appeals that says that a lawyer is not obligated to plead self-defense even though his client

may insist on it which came out after this case, long after this.

CHAIRMAN McMILLAN: Do you have further questions?

MS. BRYANT: Unh-unh (no).

CHAIRMAN McMILLAN: Mr. McMurray, following the jury verdict, did you argue to Judge Friday on sentencing?

A. I do not believe there was any argument on sentencing. I have no recollection of any argument on sentencing.

[116]

I'm sure Judge Friday inquired if we had anything further to say.

CHAIRMAN McMILLAN: And was sentencing imposed immediately?

A. Sentencing was imposed soon after the verdict came in, within — I can't talk about the time. I don't know. It may well be — it may well be that we had — you know, I would — I would believe that if we had argued all these points, I would — I would — my recollection would be that we would have asked Judge Friday to be as lenient as he could and talked in those terms, which we normally do.

But I have no recollection of that.

CHAIRMAN McMILLAN: Do you have any recollection of — in your jury argument, making the statement that there are things in this young man worth saving, or wrods to that effect?

A. I think that that's in my notes, and I'm sure I made that type argument. William Harbison is an

intelligent young man, and he's got a very fine family. And he had attended Western Piedmont Community College and had made a very good record. He's well thought of by the people there. And I think my — in talking

[117]

about the family and him, that I would have argued those positions.

CHAIRMAN McMILLAN: Do you recall saying something to the effect, I don't believe you're going to accept the argument from my friend from Charlotte?

A. No, sir. I would not have been overtly — it would have been very foolish of me to have been overtly critical of his argument. I, frankly, don't think that his position and my position was detrimental to us. He argued one position, under very difficult circumstances, and if I come back and argue another, I think the two of them working together may have been beneficial to us in getting the jury to by-pass felony murder and consider a lesser degree.

CHAIRMAN McMILLAN: There's a distinction in my mind from saying "I think you ought to find him guilty of manslaughter," on the one hand and saying on the other hand that "if you accept everything that the District Attorney has attempted to show, the most he is guilty of is manslaughter".

Do you accept that — there being a distinction between the two?

A. I think there is a distinction. I did not argue

[118]

that he should be convicted of manslaughter. In undertaking to get them to move from the degrees of

murder, I argued he should not be found guilty of any offense greater than manslaughter.

I'm not arguing for a conviction. I'm arguing for acquittal of first degree and second degree.

CHAIRMAN McMILLAN: Did you, as a part of your argument also argue for total acquittal as Mr. Fuller had done?

A. Whether at the end of my argument I made the statement that you normally do that you must find this — you should find this defendant not guilty, I do not have that recollection. I can't recall the words that I used to wind it up.

If I was asked to — my best recollection, my conclusion would have been that William should not be found guilty of murder in the first degree of murder in the second degree. Now, whether I said not guilty, I just don't recall.

CHAIRMAN McMILLAN: Is it your best recollection that the thrust of your argument was calculated to be that the should be found guilty of manslaughter?

A. No. My thrust was that he should not be found guilty

[119]

of murder in the first degree or murder in the second degree.

I did not know how to even get them to consider that except in the way that I did. There may be other methods of doing it.

CHAIRMAN McMILLAN: All right, sir. Now, do those questions from the panel provoke questions from counsel?

MR. BYRD: The answer is, no.

MR. LUNSFORD: Nothing from the State Bar.

CHAIRMAN McMILLAN: Thank you, Mr. McMurray.

(WITNESS EXCUSED: 12:12 P.M.)

CHAIRMAN McMILLAN: Next witness.

MR. BYRD: Ms. Clara Cline. While she's coming, we offer now Plaintiff's Exhibit Number 2 as identified by Mr. Fuller and now been testified to by Mr. McMurray.

CHAIRMAN McMILLAN: It's admitted.

MR. BYRD: We, likewise, offer Exhibit Number 5, the notes of Mr. McMurray's file relating to the jury argument.

CHAIRMAN McMILLAN: Admitted.

APPENDIX N

[77]

VOLUME 2B

MR. LESLIE FARFOUR,
DIRECT

Having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. McMAHON:

Q. State your name please?

A. Leslie A. Farfour, Sr.

Q. And where do you live?

A. Morganton, North Carolina.

Q. Where — how old are you, Mr. Farfour?

A. Do I have to answer that?

CHAIRMAN McMILLAN: No, sir. Give us within five years.

A. 72.

Q. (Mr. McMahon) Mr. Farfour, were you present at the trial of the *State versus William Harbison, Jr. back in 1976, that's the subject of this action?*

A. I was.

Q. Why were you present?

A. I was called on the jury.

Q. And did you in fact sit on the jury of the case?

A. I was actually the foreman of the jury.

[78]

Q. Now, do you remember that trial?

A. I do.

Q. Do you remember who was the judge?

A. Judge Friday, yes, sir.

Q. Do you remember who the lawyers were?

A. I do.

Q. Who were they?

A. Mr. McMurray and an associate and Mr. Greene and his associate, I don't know — Mr. Jacobs, deceased.

Q. When you refer to Mr. McMurray's associate, could you be referring to the gentlemen who testified here yesterday, Mr. Fuller?

A. The one with the loud coat.

CHAIRMAN McMILLAN: He apologized for that coat.

MR. BYRD: He was going on vacation.

CHAIRMAN McMILLAN: That's what he said..

Q. (Mr. McMahon) Did you understand that as you — after you were selected for the jury that mr. Fuller and Mr. McMurray were working together?

A. Yes, I was.

Q. You referred to him as Mr. McMurray's associate. Did you get the impression that he was literally

[79]

an associate?

A. He was — he was assistant. I changed the wording. He was the assistant in this trial only.

Q. Okay. Do you remember the arguments made by the lawyers to you there in the jury box?

A. Well, most of it, I do.

Q. Do you remember John McMurray making his argument to you?

A. I remember his the most.

Q. Why is that?

A. He made such a strong plea, and all during the trial I had my mind set almost at the end that it was a first degree as far as I was concerned. But his plea was so vigorous, so — I was so impressed — I didn't know he had it in him, because I've been knowing him; and that's the reason that I remember that.

Q. Do you recall anything about his — can you describe his emotion, if any, that he portrayed?

A. He was very vivacious and that was the thing that made me think about how — his delivery was great.

Q. Well, what was your reaction as a juror in this

[80]

case to Mr. McMurray's argument?

A. Well, as I told you, I had in my mind before we went — went back to the jury room that it was a first degree murder, completely. Until I heard his plea, would you call it? I'm not a lawyer. I just — in plain language his argument to us, he sort of gave me a — made me hesitate as to whether it was first degree or not.

Q. Did his argument appear to you there on the jury to be sincere?

A. Very sincere. This is what I meant to say. It was very sincere. Conscientious. Very vivacious.

Q. Did he argue at length, do you recall if it was long?

A. I can't — I can't truthfully say that. I don't know how long it was. We listened to the other lawyers as well as to the charge from the judge and I just don't know how long it was.

Q. Now, after you — do you recall any other things about the argument of John McMurray?

A. In what way are you talking about?.

Q. Well, my question to you is, after you heard the argument of McMurray or during that argument, do you ever recall his suggesting

[81]

that you ought to find William Harbison guilty of anything?

A. I don't remember that statement whatsoever, and I have been listening here for two (2) days trying to remember that and I never heard that — I mean, to me, I never heard it.

Q. When you —

A. (Interposing) He might have said it but I didn't hear it.

Q. Well, when you left the Courtroom after hearing all of the arguments, was it your reaction and is it your memory now that Mr. McMurray had asked you or suggested that you as a juror should find his client guilty or anything?

A. No, I don't recall anything like that. He didn't ask us me — didn't ask us anything.

Q. Now —

A. (Interposing) He was pleading for his client, you call him a client.

Q. Unh-hunh (affirmative). Do you recall the deliberations of the jury, after you began your deliberations?

A. I do.

[82]

Q. You say you were the foreman?

A. I was the foreman.

Q. Did you — were you the person in charge of taking —

A. (Interposing) The polls.

Q. How did you do that?

A. I took the poll about every thirty (30) minutes, to try to see how close we were to an agreement.

Q. What sort of method did you use in taking a poll?

A. I passed out pencil and paper. I got it from the jailer, whatever his name was.

Q. Do you recall the issues or papers that the judge gave to you when you went back to the jury room?

A. Yes, he gave us four verdicts that we could render: first, second, manslaughter and acquittal.

Q. Now what — after you selected a foreman, what was the first discussion in the jury room concerning?

A. I asked one by one, each one of them, what they thought, just right out of the bat. I said I don't want any arguments at all, just what do you think, how would you vote if we voted

[83]

right now?.

Q. Was there a unanimous vote at that time?

A. No. It was about — including me — I went in with the first degree idea but then I changed to second degree. At no time, whatsoever, was manslaughter or acquittal brought up. We didn't even discuss it. We were so close.

Q. Do you recall how long you deliberated?

A. Now, the first day, I think we had to leave and go spend the night in a motel. It wasn't the Holiday Inn, either.

Q. I won't ask you where but do you —

A. (Interposing) It was England's Motel or something like that, I don't know what the name of it is now.

Q. Do you — at the time you left that night, did you make any inquiries or ask any questions of the judge?

A. I came back to ask him if we could skip over one.

Q. One what?

A. One of the verdicts and go to the next one and talk about it.

Q. Do you recall which verdict that was?

A. I think it was the first degree and we wanted to

[84]

move up — I wanted to move it up to see if I couldn't get a quicker verdict.

Q. Now, do you recall whether, when you were given the issues by the judge, Judge Friday, do you remember anything about an issue on felony murder?

A. Well, not in those exact words. As I say, I'm not a lawyer.

Q. Okay?

A. My son is, but I'm not.

Q. Do you recall receiving two slips of paper or just one with the issues on it with the possible verdicts?

A. I don't recall that. I don't recall if it was one (1) or two (2) but I had the slip or slips of paper in my hand..

Q. But you do recall asking a question of Judge Friday?

A. (Interposing) That's right.

Q. — as to whether the jury could skip over the first issue and go to the second?

A. That's right, and go to the second. And he said I could do anything I wanted to, I think.

Q. So when you — so when you went back in to

[85]

begin your deliberations again, did you take another poll?

A. As I told you, I tried to take a poll every 30 minutes.

Q. Well, when you found out that you could skip, did you take a poll then?

A. I took a poll then, and it was the next day late that we finally agreed on the second degree.

Q. During the entire time that the jury was out and you presided as foreman, I take it there was some disagreement among the jurors as to your unanimous verdict?

A. That's right.

Q. What was that disagreement over?

A. Whether it would be first or second degree. The other two (2) weren't even brought up.

MR. McMAHON: That's all.

A. They had already — they had already set in their mind either first or second.

MR. McMAHON: That's all the questions I have.

CHAIRMAN McMILLAN: Mr. Lunsford?

MR LUNSFORD: We have no questions of

[86]

Mr. Farfour.

CHAIRMAN McMILLAN: Mr. Farfour, do you recall any mention by the lawyers saying — the

defense lawyers — saying that the defendant ought to serve some time?

A. I don't recall that at all. That's what I've been trying to get in the last two (2) days, from listening to all these eloquent speeches and all. I don't recall that at all. I don't recall the — Lawyer McMurray saying that at all.

CHAIRMAN McMILLAN: All right, sir.

MS. BRYANT: Can you tell us what you do recall?

A. What I do now?

MS. BRYANT: Unh-hunh (affirmative).

A. I'm retired.

CHAIRMAN McMILLAN: No. She wanted to know what you do recall about the argument.

A. Oh, what I do recall. I see. I though you said at home.

MR. McMILLAN: He doesn't do anything at home.

MS. BRYANT: We've asked you what — I'm asking can you tell us what you do recall about

[87]

the arguments of defense counsel?

A. Well, I recall — the most vivid thing in my mind is how they tried to get self-defense out of that car going to the right of William Harbison, and, if they were going to hit him, why didn't they go to the left and and knock him out? But he didn't, he went by him.

MS. BRYANT: Okay, I'm asking — you're — can you tell me what you recall about the argument?

A. You know that's eight (8) years ago? Would you recall anything eight (8) years ago? I don't think you would either. I just — I know Mr. McMurray did an excellent job in defending this man because we were all set for first degree, I was at least and most of the others. And I was the one that kept them in so long because I listened to his defense and it sort of put a question in my mind. I says, that boy could have been so jealous of his girlfriend, or used to be girlfriend that it excited him and that's when he did what he did, I would think being so jealous, that he just got angry — angry jealous, and I think that's the worst kind.

[88]

CHAIRMAN McMILLAN: And was Mr. Mc Murray arguing that to you?

A. I can't say that he was. That was just in my opinion, I think. Well, I was listening to the whole trial, and I tried to hear it all in my mind.

CHAIRMAN McMILLAN: All right, sir. Thank you, Mr. Farfour.

(WITNESS EXCUSED: 4:55 P.M.)

APPENDIX O

NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR

[FILED: 1985 March 28]

THE NORTH CAROLINA STATE BAR,
Plaintiff,

v.

JOHN H. McMURRAY,
Attorney,
Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
ORDER OF DISMISSAL

This cause was heard by the undersigned, duly appointed Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar on Friday and Saturday, March 15 and 16, 1985. The Plaintiff was represented by L. Thomas Lunsford, II, and the Defendant was represented by Robert B. Byrd, Lawrence D. McMahon, and Sam J. Ervin, IV. Based upon the evidence and the stipulations of the parties which have been placed of record, the Committee makes the following FINDINGS OF FACT:

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and was the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, John H. McMurray, was admitted to the North Carolina State Bar on September 7, 1948, and is and was at all times referred to herein, an Attorney at Law, licensed to practice law in the State of North Carolina subject to the Rules, Regulations and Code of Professional Responsibility of the North Carolina State Bar and the laws of the State of North Carolina.

3. At and during all of the times hereinafter referred to, the Defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Morganton, Burke County, North Carolina.

4. William Harbison, Jr., (Harbison) was the defendant in two criminal cases in the Burke County Superior Court which were styled *State of North Carolina v. Willian Harbison, Jr.* and numbered 76 CR 3865 and 76 CR 3862. In 76 CR 3865, he was charged with first degree murder and in 76 CR 3862, he was charged with felonious assault.

5. These cases were consolidated for trial and were tried during the term of Superior Court beginning August 30, 1976. The Honorable John R. Friday presided.

6. Harbison was represented in these cases by the Defendant John H. McMurray (McMurray) of the Burke County Bar and James C. Fuller, Jr. (Fuller)

of the Mecklenburg County Bar. McMurray had been appointed by the court to represent Harbison. Fuller was privately retained by Harbison's family.

7. Prior to trial, Harbison expressed to his attorneys Fuller and McMurray that he desired to plead not guilty and further desired that his plea of self-defense be pursued throughout the trial.

8. Harbison entered a plea of not guilty to all charges.

9. Harbison testified in accordance with his defense of self-defense.

10. Judge Friday ultimately charged the jury on the defense of self-defense.

11. At no time did Harbison authorize McMurray to abandon the plea of not guilty or the defense of self-defense.

12. Following the close of the evidence, both of Harbison's lawyers argued to the jury. Fuller argued first for acquittal based on self-defense.

13. After Fuller's argument and the argument of the District Attorney, McMurray gave a closing argument for the defense. As a part of his closing argument, McMurray made reference to the evidence being sufficient to convict his client of manslaughter.

14. Although the court reporter, Clara T. Cline, did make stenographic notes of the closing arguments along with the rest of the proceedings, a transcription of her notes of the closing arguments was never requested or made. Although a diligent search for the notes was made when this matter arose in 1984, they have not been located and are deemed lost.

15. The Committee is unable to determine by clear, cogent and convincing evidence exactly what was included in the entire closing argument of

McMurray. The Commttee is unable to determine whether any of the following possibilities occurred: (1) whether McMuray couched his argument with respect to conviction of manslaughter in the alternative to an argument for acquittal; (2) whether he argued on the theory that the evidence for the State, taken in the light most favorable to the State, warranted at most a conviction of manslaughter; or (3) whether he abandoned the defense of self-defense entirely, abandoned the plea of not guilty and based his entire closing argument on the theory that his client was in fact guilty of manslaughter.

16. Harbison was found guilty by the jury of second degree murder and felonious assault. Judge Friday sentenced Harbison to life imprisonment for murder and to 10 years imprisonment for assault. Harbison thereafter served notice of appeal and McMurray and Fuller were appointed by th Court to represent Harbison on appeal.

17. The murder conviction was appealed by right directly to the North Carolina Supreme Court. A motion to by-pass the North Carolina Court of Appeals was granted relative to the assault case and the cases on appeal were consolidated.

18. Neither of Harbison's attorneys assigned as error before the North Carolina Supreme Court any aspect of the closing argument of McMurray.

19. On November 11, 1977, the North Carolina Supreme Court filed its decision in *State v. Harbison,* 293 N.C. 475. The Court found no error and affirmed the conviction.

20. A federal *habeas corpus* proceeding was thereafter filed on Harbison's behalf relative to his conviction. No question of impropriety was raised concerning McMurray's closing argument.

21. The first time McMurray was made aware of any allegation of impropriety concerning his closing argument was during 1984, approximately eight years after the Harbison trial.

Based upon the foregong Findings of Fact, the Committee makes the following Conclusions of Law:

1. The client who stands accused of a crime has an absolute right to decide how to plead. Although his lawyer has a professional obligation to assist him in making that decision by informing him of considerations relevant to his best interests, the decision is exclusively that of the client. See EC7-7 and 7-8. Once a decision to plead not guilty is made, it is the lawyer's duty under DR7-101(A)(1) to employ every reasonably available means, including reliance upon the presumption of innocence and the assertion of any reasonably available defense, to achieve his client's lawful objectives. Included within the client's lawful objectivs can be acquittal and/or, when authorized by the client, the conviction of a lesser included offense. Indeed, the client's best interests may be served by a decision to argue solely for conviction of a lesser included offense and to abandon all arguments for acquittal. However, it is necessary to realize that such a decision, like the decision of how to plead, is for the client to make, and is binding upon the lawyer.

2. In a homicide case, once a criminal defendant has made the decision to plead not guilty, has instructed his attorney to maintain his innocence under the theory of self-defense, has testified in accordance with that theory, and has an expectation that the trial judge will charge the jury on that defense, the attorney cannot, absent permission of his client, abandon the defense of self-defense and the presumption of innocence and argue exclusively for a conviction of a lesser included offense. To do so

would amount to the compromising of the client's earlier decision with respect to his plea.

3. The lawyer is permitted, and in fact may have a duty, to argue in the alternative to acquittal, that the evidence of the State would at most permit a finding of guilt of some lesser included charge.

4. Because the Plaintiff has failed to prove in this case by clear, cogent convincing evidence what was said by the Defendant in the entirety of his closing argument, the Committee concludes that the Plaintiff's case should be dismissed for failure to sustain the burden of proof.

IT IS THEREFORE ORDERED that this case be dismissed.

This the 28th day of March, 1985.

/s/ John B. McMillan, Chairman

/s/ Harry Sherwood

Dissenting:

/s/ Angela R. Bryant

DISSENT

The State Bar proved by clear, cogent, convincing, credible, uncontroverted and competent evidence that Attorney McMurray said in the jury argument at issue herein that the criminal defendant, Harbison, should be convicted of manslaughter. Attorney McMurray in his written statement in response to the grievance admitted. "I stated to the jury that on his evidence I was of the opinion defendant would be convicted of some criminal offense, but he should be found guilty only of manslaughter." The State Bar further proved by clear, cogent convincing, credible, uncontroverted and competent evidence that Attorney McMurray made statements to the jury that suggested that his client would and/or should be convicted without the prior consent of, consultation with or knowledge of his client or co-counsel. Moreover, the statement and suggestion that his client should be convicted of manslaughter was in subversion of and inconsistent with the criminal defendant's plea of not guilty based on self-defense. The clear, cogent, convincing and competent evidence further showed that Attorney McMurray made the statement in his jury argument intentionally and that he believed that a decision to suggest or confess his client's guilt to the jury was a matter in his professional discretion about which he did not have to consult with his client. All the competent and credible evidence taken together proved that Attorney McMurray violated DR7-101(A)(1) in this instance.

As an advocate, a lawyer should resolve in favor of his client any doubts as to the bounds of the law and urge any permissible construction of the law favorable to his client without regard to the likelihood that it will ultimately prevail. (E.C. 7-3 and 7-4). In the criminal trial at issue here, the trail judge had indicated that he would be instructing the jury on self-defense, so the criminal defendant's objective of a not guilty verdict based on self-defense was "non-frivolous" as a matter of law.

A lawyer should advise his client vigorously if in his professional opinion an adverse result is likely from a certain course of conduct or strategy; however, on matters affecting the merits of the cause and involving non-legal factors (e.g. the likelihood of a particular jury reaction or the impact of race, cultural differences, socio-economic status and/or sympathy), the decision about objectives and methods is for the client after consultation with his lawyer. (EC7-5, 7-7, 7-8 and 7-24). In this case, defendant Harbison did not receive the benefit of confronting the opinion and experience of his lawyer because Attorney McMurray did not advise or consult with him. As a result, defendant Harbison was not accorded the human integrity inherent in having a personal advocate in the adversary process. He felt abandoned by the very person who was supposed to be on his side. Our system affords each of us the human dignity that comes with the opportunity to maintain our innocence to the end. The criminal defendant serves the time not the attorney. If a lawyer cannot seek the lawful objective of his client in litigation, he must confront and consult with his client, and if necessary, request permission to withdraw without revealing any confidences to the Court that would prejudice his client. *See* DR7-102(B)(1).

I was influenced by the ten or more defense witnesses who presented inadmissible opinion evidence for the defendant and "for the record only" on the ultimate issues to be determined by his hearing committee, so I must infer that it is very likely that the other committee members were also influenced. Most of those witnesses did not present any admissible evidence. In hindsight, the defendant should have been limited to an offer of proof by affidavit, deposition or statement for the record, because of the volume of the improper evidence and because of the highly political nature of the witnesses, i.e., a federal court judge, a former senator, superior court judges, the attorney general and the chairman of the Democratic Party.

Finally, I will examine the significance of the racial

implications of this situation. The criminal trial arose out of an interracial relationship between a Black male defendant and the victims, a white female and a Black male. It is my opinion that the impact of the racial character of this situation was not taken into account in the lawyer-client relationship nor in the criminal trial. It is clear from this experience and from an examination of social-psychological literature, that even in 1985 and surely in 1976, negative racial attitudes do affect the response of lawyers, clients, and jurors to sexually-motivated crimes when the parties are of difference races. The lack of awareness and sensitivity to the impact of racial differences on the ethical and professional decisions of lawyers can best be exemplified by a quote from a note written to Attorney McMurray by defendant Harbison's mother which was introduced as defendant's exhibit #6: "Thank you for trying to help William Jr. The pressures have been great But being colored the cards are stack against us before Court even starts".

For all of the above stated reasons, I strenuously and respectfully dissent from paragraph fifteen of the "Findings of Fact", paragraph four of the "Conclusions of Law" and from the dismissal of Plaintiff's case based thereon. The State Bar carried its burden of proof that the conduct of Attorney McMurray violated DR7-101(A)(1).

APPENDIX P

No. 400PA84
Filed: 1985 May 13

TWENTY-FIFTH DISTRICT — BURKE

****

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA

v

WILLIAN HARBISON, JR.

MOTION IN DIMINUTION OF THE RECORD ON APPEAL OR TO REMAND FOR AN EVIDENTIARY HEARING

The Honorable Chief Justice and Associate Justices of the North Carolina Supreme Court

The State of North Carolina respectfully moves this court to accept the attached transcript of hearing and exhibits in the case of THE NORTH CAROLINA STATE BAR v. JOHN H. McMURRAY, NO. 84-CHC-16, in diminution of the record on appeal previously filed herein or, in the alternative, to remand this matter to the Superior Court of Burke County for an evidentiary hearing. As grounds therefore the State shows unto the Court the following:

STATEMENT OF FACTS

Defendant was convicted of second degree murder and assault with a deadly weapon inflicting serious bodily injury in Burke County Superior Court on August 30, 1976. He received a life sentence on the murder conviction and a ten year sentence on the assault conviction (Rpp 12-13). Those convictions were affirmed by this Court on November 11, 1977. (Rpp. 15-24); *State v. Harbison,* 293 N.C. 474, 242 S.E. 2d 844 (1977). On 9 December 1983 the Honorable

Woodrow Jones, Chief Judge, United States District Court for the Western District of North Carolina, denied defendant's petition for a writ of habeas corpus in *Harbison v. North Carolina,* No. A-C-83-225 (W.D.N.C. 9 Dec. 1983).

On May 3, 1984 defendant filed a motion for appropriate relief, *pro se,* in the Burke County Superior Court, alleging for the first time that he had been denied effective assistance of counsel at trial. Defendant specifically alleged (among other grounds) that his court appointed attorney, John McMurray, made the following statement during closing argument, without defendant's authorization.

> Ladies and Gentlement of the jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic] and I want to leave here with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree. (Rpp. 26-27).

This statement was not based on a direct quote from a transcript since the arguments of counsel were not transcribed. (See Tr. p. 511). The only other evidence of Mr. McMurray's argument before the Superior Court was a reponse by defendant's retained counsel, James Fuller, to an interrogatory in March 1984 in which Mr. Fuller stated,

> During his argument, I was quite surprised to hear him [Mr. McMurray] suggest that Mr. Harbison should be convicted of manslaughter. He asked the jury to choose between two "extreme views," that advanced by me and by the District Attorney....(Rp. 31).

The motion for appropriate relief was decided by Judge Claude S. Sitton on 11 June 1984. Judge Sitton did not hold

an evidentiary hearing but relied on the motion, interrogatories, the files and the appellate review. (Rp. 32). He simply concluded that although the comments attributed to Mr. McMurray were not proper, they were not prejudicial. Judge Sitton did not make an express finding that Mr. McMurray had in fact made the statement attributed by defendant. No evidence was received from Mr. McMurray, the trial judge or others present at trial.

Defendant submitted a petition for writ of certiorari to this Court on 22 June 1984 (filed 11 July 1984). The petition was allowed on 6 November 1984 with review limited to "whether trial counsel's argument to the jury constituted prejudicial error." The record on appeal was certified on 9 January 1985 and submitted to this Court.

On 11 June 1984, the same day that Judge Sitton denied the motion for appropriate relief, defendant filed a grievance against Mr. McMurray with the North Carolina State Bar, concerning the subject matter of this appeal. The case came on for public hearing on March 15 and 16, 1985. Several witnesses testified under oath including defendant, Mr. Fuller, Mr. McMurray and Judge Friday, (who presided at defendant's 1976 trial), and the jury foreman. The evidence concerning the content of Mr. McMurray's argument was conflicting. Mr. McMurray specifically denied making the statement attributed to him by defendant (Tr. of Bar Hearing, ol. 2A pp. 102-03) and, further testified that,

> I did not argue that he should be convicted of manslaughter. In undertaking to get them [the jury] to move from the degrees of murder, I argued that he should not be found guilty of any offense greater than manslaughter. I'm not arguing for a conviction. I'm arguing for acquittal of first degree and second degree.

(Tr. of Bar Hearing, Vol. 2A, pp. 117-18).

Judge Friday testified that he could not recall what Mr.

McMurray's argument was but was sure that he would not have allowed Mr. McMurray to make the statement attributed by defendant, but would have stopped him even in the absence of an objection. (Tr. of Bar Hearing Vol. 2A, pp. 145-46). The foreman of the jury, Leslie Farfour also testified, stating that he had no recollection of Mr. McMurray suggesting that the jury find defendant guilty of anything. Mr. Farfour died just recently.

Subsequent to the conclusion of the hearing the Disciplinary Hearing Commission dismissed the grievance with one dissent) finding that

> The Committee is unable to determine by clear, cogent and convincing evidence exactly what was included in the entire closing argument of McMurray. The committee is unable to determine whether any of the following occurred:
>
> (1) whether McMurray couched his argument with respect to conviction of manslaughter in the alternative to an argument for acquittal;
>
> (2) whether he argued on the theory that the evidence for the State taken in the light most favorable to the State, warranted at most a conviction of manslaughter; or
>
> (3) whether he abandoned the defense of self-defense entirely, abandoned the plea of not guilty and based his entire closing argument on the theory that his client was in fact guilty of manslaughter.

(Order of Dismissal of State Bar, Finding of Fact #15).

QUESTION PRESENTED

Whether the State's Motion in Diminution of the Record on Appeal or to Remand for an Evidentiary Hearing should be granted?

DISCUSSION

The issue to be decided on this appeal has been succinctly stated by this Court in its Order allowing defendant's petition for writ of certiorari. That issue is,

> Whether trial counsel's argument to the jury constituted prejudicial error?

It is obvious that this issue cannot be resolved until there has been a determination of what counsel's argument actually was.

No transcript of the argument was made and the court reporter cannot locate her notes. (Tr. of Bar Hearing, Vol. 2 pp. 120–31). Nor has there been a judicial finding as the content of that argument. When Judge Sitton decided the motion for appropriate relief he only had the 8 year old recollection of defendant and James Fuller before him. When his order denying relief is read in context, it is clear that he was making a finding only that defendant had not shown prejudice sufficient to warrant a new trial even though the argument attributed to Mr. McMurray was improper. This is analagous to a dismissal for failure to state a claim under Rule 12(b)(6) of the Rules of Civil Procedure which assumes the truth of the allegations. He held no evidentiary hearing on the *pro se* motion apparently reasoning that this was not necessary in view of his holding. See, N.C.G.S. §15A-1420(c)(2). However, the subsequent disciplinary proceeding before the State Bar reveals that there is a question of fact which should be resolved.

The State respectfully submits that an accurate resolution of the issue presented in this case is dependent upon a judicial determination as to the actual content and thrust of Mr. McMurray's argument. That determination may be made in one of two ways. First, the case could be remanded to the Superior Court of Burke County for an evidentiary hearing on the defendant's Motion for Appropriate Relief under N.C.G.S. §15A-1420(c)(2)(4), *compare,* N.C.G.S. §15A-1418(b); *and State v. Hurst,* 304 N.C. 709, 285 S.E. 2d 808 (1982).

A second alternative would be for this court to accept the transcript of the State Bar proceedings in diminution of the record on appeal since that proceeding was, in fact, an evidentiary hearing with full rights to call and require the attendance of witnesses, present evidence take sworn testimony, cross-examine witnesses, etc. After review of the transcript of those proceedings this Court may make its own determination as to the content of Mr. McMurray's argument, or conversely, decide that such a determination cannot be made. In the latter event defendant's appeal would properly be dismissed as it is his duty to preserve the record on appeal or seek a stipulation from the District Attorney on the matter in question. *State v. Bennett,* 308 N.C. 530, 302 S.E. 2d 786 (1983). Mr. Fuller testified at the State Bar hearing that he did not request the court reporter to transcribe the arguments (Tr. of Bar Hearing, Vol. 1 pp. 167–68). Defendant's exhibit 2, introduced at the Bar hearing shows that the court reporter wrote to counsel specifically asking if the arguments should be transcribed. However, court reporter also testified that no one had asked her to transcribe the arguments. (Tr. of Bar Hearing Vol. 2 p. 127). Nor is the fact the District Attorney agreed to the record on appeal equivalent to a stipulation that defendant's rendition of Mr. McMurray's argument contained in the Motion for Appropriate Relief is accurate.

Another important justification for accepting the transcript of the Bar proceedings in diminution of the record on appeal is that it sheds light upon both Mr. Fuller's and Mr. McMurray's perceptions of the case and how the jury was reacting. This is critical for, as the U.S. Supreme Court recently stated in *Strickland v. Washington,* ____ U.S. _____ 80 L.Ed.2d 674 694 (1984),

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time....

In summary, the State submits that the best interests of justice will be served by proceeding only after there has been a judicial determination as to the actual content of and reasons for Mr. McMurray's argument.

CONCLUSION

For the reasons stated above, the State's Motion in Diminution of the Record on Appeal or to Remand for an Evidentiary Hearing should be granted.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ Lucien Capone III
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7387

APPENDIX Q

SUPREME COURT OF NORTH CAROLINA
Area Code 919 733-3723 P.O. Box 2170
Raleigh, North Carolina 27602

June 11, 1985

Mr. Lucien Capone, III
Assistant Attorney General
Department of Justice
Raleigh, N.C. 27602

Re: State v. William Harbison, Jr.
No. 400PA84

Dear Mr. Capone:

Attorney General's Motion In Diminution of Record on Appeal or to Remand for an Evidentiary Hearing has been filed and the following order entered:

> "Denied by order of the Court in conference this the 4th day of June 1985.
>
> /s/ **Fry, J.**
> For the Court

Accordingly, the Attorney General shall have up to and including 27 June 1985 to file his brief in this Court.

Very truly yours,

J. Gregory Wallace
Clerk of the Supreme Court

JGW:wdp

xc: Mr. Adam Stein, Appellate Defender
Mr. Malcom Ray Hunter, Jr., 1st Assistant Appellate Defender
Mr. Major A. Joines, Clerk of Superior Court
Mr. Robert E. Thomas, District Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing APPENDIX by depositing same in the United States mail at Raleigh, North Carolina, first class postage prepaid, to:

Mr. Louis D. Bilionis
Box 1070
Raleigh, North Carolina 27602

This 13th day of February, 1986.

/s/Barry S. McNeill
Assistant Attorney General
Attorney for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1337

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

STATE OF NORTH CAROLINA

Petitioner,

v.

WILLIAM HARBISON, JR.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

Malcolm Ray Hunter, Jr.
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COUNSEL OF RECORD FOR RESPONDENT

Louis D. Bilionis
Assistant Appellate Defender

COUNSEL FOR RESPONDENT

87pp

QUESTION PRESENTED

WHETHER THE NORTH CAROLINA SUPREME COURT CORRECTLY CONCLUDED THAT IT IS ESSENTIAL TO OUR ADVERSARIAL CRIMINAL PROCESS THAT ANY DECISION TO CONCEDE GUILT -- WHETHER FORMALLY BY PLEA OR FUNCTIONALLY BY ARGUMENT TO THE JURY -- BE MADE BY THE ACCUSED AND NOT, AS HERE, BY A LAWYER IN DIRECT CONTRAVENTION OF HIS CLIENT'S EXPRESSED WISHES.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 3

ARGUMENT 8

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Boykin v. Alabama,
395 U.S. 238 (1969) 14

Brookhart v. Janis,
384 U.S. 1 (1966) 14

Cabana v. Bullock,
38 Cr. L. Rptr. 3093 (U.S. Jan. 22, 1986)
(No. 84-1236) 12

Commonwealth v. Lane,
382 A.2d 460 (Pa. 1978) 18

Connecticut v. Johnson,
460 U.S. 73 (1983) 19

Cuyler v. Sullivan,
446 U.S. 335 (1980) 10

Faretta v. California,
422 U.S. 806 (1975) 13

Francis v. Spraggins,
720 F.2d 1190 (11th Cir. 1983), cert.
denied, ___ U.S. ___, 105 S.Ct. 1776 (1985) 17

Gedders v. United States,
425 U.S. 80 (1976) 10

Hill v. Lockhart,
54 U.S.L.W. 4006 (U.S. Nov. 18, 1985)
(No. 84-1103) 12,13,19

In re Winship,
397 U.S. 358 (1970) 8,10,18,19

King v. Strickland,
748 F.2d 1462 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2020 (1985) 18,19

McKaskle v. Wiggins,
465 U.S. 168 (1984) 13

McNeal v. Wainwright,
722 F.2d 674 (11th Cir. 1984) 19

Mullaney v. Wilbur,
421 U.S. 684 (1975) 8,10,13,18,19

Nix v. Whiteside,
54 U.S.L.W. 4194 (U.S. Feb. 26, 1986)
(No. 84-1321) 10,21

People v. Hattery,
___ Ill.2d ___, 488 N.E.2d 513 (1985) 16-19,20

State v. Braswell,
312 N.C. 553, 324 S.E.2d 241 (1985) 15

State v. Harbison,
315 N.C. 175, 337 S.E.2d 504 (1985) ..... passim

State v. Harbison,
293 N.C. 474, 238 S.E.2d 449 (1977) 5

State v. Lamm,
232 N.C. 402, 61 S.E.2d 188 (1950) 5

State v. Reynolds,
307 N.C. 184, 297 S.E.2d 532 (1982) 5

State v. Sinclair,
301 N.C. 193, 270 S.E.2d 418 (1980) 12

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

United States v. Cronic,
466 U.S. 648 (1984) ..... passim

United States v. Leifried,
732 F.2d 388 (4th Cir. 1984) 19

Wiley v. Sowders,
647 F.2d 642 (6th Cir.), cert. denied,
454 U.S. 1091 (1981) 17

Young v. Zant,
677 F.2d 792 (11th Cir. 1982) 18

Constitutional Provisions

U.S. Const. Amend. VI ..... passim

U.S. Const. Amend. XIV, Sec. 1 ..... passim

N.C. Const. Art. I, Sec. 19 2

N.C. Const. Art. I, Sec. 23 2,3

Statutes and Rules

28 U.S.C. 1257 1

28 U.S.C. 2254 12

N.C.G.S. 14-17 5

N.C.G.S. 15A-1011 through 15A-1026 12

N.C.G.S. 15A-1422(c)(3) 5

Rule 32, North Carolina Rules
of Appellate Procedure 1

Miscellaneous

Standard 4-5.2, ABA Standards for Criminal
Justice (2nd ed. 1980) 21

North Carolina Code of Professional Responsibility:

Disciplinary Rule 7-101(A)(1) 21

Ethical Consideration 7-7 21

Ethical Consideration 7-8 21

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

No. 85-1337

STATE OF NORTH CAROLINA, Petitioner,

v.

WILLIAM HARBISON, JR., Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of North Carolina, reported at 315 N.C. 175, 337 S.E.2d 504 (1985), is reproduced in the Petitioner's Appendix. (Pet. App. A1-A7)

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 30, 1985.[1] The State's petition for writ of certiorari, invoking the jurisdiction of this Court under 28 U.S.C. 1257, was filed on February 8, 1986.

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[1]The opinion of the Supreme Court of North Carolina was filed on December 10, 1985. The judgment of the Court (as well as the Court's mandate) is entered twenty (20) days after the date of the filing of the opinion. N.C. R. App. P. 32.

CONSTITUTIONAL PROVISIONS INVOLVED

In the Supreme Court of North Carolina, the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution were asserted by the Respondent.

U.S. Const. Amend. VI provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Sec. 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Const. Art. I, Sec. 19 provides:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subject to discrimination by the

State because of race, color, religion, or national origin.

N.C. Const. Art. I, Sec. 23 provides:

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

STATEMENT

On May 3, 1984, William Harbison, Jr., filed a pro se motion for appropriate relief in the Superior Court for Burke County alleging that he was denied effective assistance of counsel at his 1976 trial for homicide and felonious assault. (Pet. App. A42-A46) Harbison's verified pleading focused upon the closing argument of John H. McMurray, his court-appointed counsel. McMurray, it was alleged, conceded that the defendant was not innocent and indeed deserved punishment. "I don't feel," McMurray allegedly said, "that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." (Pet. App. A44-A45)

That closing argument came as a surprise to Harbison, whose plea had been not guilty because he steadfastly maintained that he acted in self-defense and deserved no punishment at all. Harbison admitted firing several shots at a vehicle driven by Danna Franklin, a periodic girlfriend, and it was shown that the shots wounded Franklin and killed a passenger, Morris Hardy. But Harbison, who

testified, denied that it was the cold-blooded killing of a perceived rival suitor suggested by the prosecution.

The event, according to the defense, arose in a decidedly different way. Harbison and Franklin had taken to meeting clandestinely on secluded backroads to hide their interracial relationship. Often, they would signal their desire to get together by flashing the lights of their cars at one another when they would pass on the local streets. On the night in question, Harbison saw the lights of Franklin's car flash at him and he assumed that a rendezvous was suggested. As was the custom, Harbison followed the Franklin car along country roads. But he became concerned when the Franklin car travelled so fast and so erratically. It gradually occurred to Harbison that the vehicle was being driven by someone other than Franklin -- likely Franklin's father, who stood opposed to Harbison's relationship with his daughter.

Finally overtaking the vehicle, Harbison left his car and approached the other car on foot. Suddenly, the car accelerated toward him. Fearing for his safety, Harbison drew his gun and fired two shots at the car's tire. The car kept coming at the defendant and he discharged three more shots in a panic while side-stepping the vehicle.

McMurray's argument also surprised James C. Fuller, Jr., who appeared as co-counsel for the defendant at trial. (Pet. App. A51) Until McMurray's reversal of course, both Fuller and McMurray had been adhering to their client's claim of self-defense. Indeed, Fuller pressed that chosen defense in his own closing argument that was delivered to the jury before McMurray's. Like Harbison, Fuller was neither consulted nor even warned about McMurray's decision to break rank and confess Harbison's guilt.

The jury evidently disagreed with the prosecution's theory of the case, for it refused to find Harbison guilty of first degree murder.[2] But the jury evidently agreed with McMurray; instructed on self-defense, the jury rejected the defense and found the defendant guilty of second degree murder and assault with a deadly weapon inflicting serious injury.[3] If the sentence Harbison received is any measure, he enjoyed no unexpected windfall from McMurray's unwanted concession of guilt. A life sentence, the sternest sentence available under North Carolina law at the time of his trial, was imposed. On direct appeal, the Supreme Court of North Carolina affirmed. See State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

In the state post-conviction proceeding, the prosecution filed no response to Harbison's allegations. The Superior Court, without holding an evidentiary hearing, simply denied Harbison's motion for appropriate relief. Still proceeding pro se, Harbison then petitioned the Supreme Court of North Carolina for review by way of writ of certiorari.[4] The Court granted the writ, appointed North Carolina's Appellate Defender to represent Harbison, and

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[2]In North Carolina, first degree murder is the unlawful killing of a human being with malice and with a specific intent to kill with premeditation and deliberation. E.g., N.C.G.S. 14-17; State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950). Second degree murder differs from first degree murder in that no specific intent, premeditation, or deliberation need be established. E.g., State v. Reynolds, 307 N.C. 184, 297 S.E.2d 532 (1982).

[3]In the assault case, the jury rejected a possible finding that Harbison intended to kill Danna Franklin.

[4]There is no right of appeal to North Carolina's appellate courts from a denial of a post-conviction motion for appropriate relief brought after the conclusion of the direct appeals process. N.C.G.S. 15A-1422(c)(3).

specified that its review would be "limited to whether trial counsel's argument to the jury constituted prejudicial error." (Pet. App. A56)

As Petitioner points out at length (Pet. at 8-10), the North Carolina State Bar conducted an independent disciplinary proceeding against McMurray while Harbison's case was pending in the Supreme Court. Omitted from the State's discussion, however, is the fact that the three-member Bar panel unanimously concluded that McMurray's alleged conduct constituted a violation of his duties under North Carolina's Code of Professional Responsibility. The Bar panel divided only on whether the alleged facts were satisfactorily established. (Pet. App. A123-A131)

Petitioner now draws liberally from evidence adduced during the Bar's proceeding, but the Supreme Court of North Carolina specifically denied Petitioner's request to make those matters part of the record.[5] (Pet. App. A139) The certified record of the case as it appeared to the Supreme Court of North Carolina, accordingly, will fail to support many of Petitioner's factual assertions and will not contain many materials now gathered in Petitioner's Appendix.

The Supreme Court of North Carolina, in a unanimous opinion, vacated Respondent's convictions and remanded the cases for a new trial. As a first step in its analysis, the Court examined McMurray's argument in light of the facts of the case and found that the closing argument was functionally equivalent to the entry of a plea of guilty to

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[5]Omitted from the Petitioner's Appendix is Harbison's response to the State's request to enlarge the record in the Supreme Court of North Carolina. Harbison opposed the request because he was not a litigant in the Bar proceeding, had no say in the conduct of that litigation, and could neither call witnesses nor proffer argument there.

the crime of manslaughter. It was a concession of guilt that was unauthorized by Harbison and in fact was contrary to his chosen plea, his chosen defense at trial, and his testimony at trial. Reasoning that a lawyer has no power or discretion to overrule a client's plea of not guilty, the Court concluded that Harbison was the victim of ineffective aassistance. 315 N.C. at 180, 337 S.E.2d at 507 (reproduced at Pet. App. A6). While "cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy," the Court nonetheless believed that such a strategy is permissible only when it is conducted with the approval of the client. "[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands." Id.

Turning to the question of prejudice, the Court found what it thought obvious -- a lawyer's unauthorized concession of his client's guilt causes a trial to lose certain of the fundamental attributes that allow us to say that a fair trial has been had:

> [W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.
>
> * * *
>
> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id.

Harbison suffered prejudice -- as would virtually any individual standing in his shoes. He was denied advocacy of his interests, an uncompromised test of the State's case under In re Winship, 397 U.S. 358 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975), and an uncompromised determination of his case by a jury.

The Supreme Court of North Carolina paid heed to evidence adduced at Harbison's trial and consulted its prior opinion affirming the convictions on direct appeal. 315 N.C. at 177-78, 337 S.E.2d at 505-06 (Pet. App. A2-A3). The Court likewise was aware of the unusual factual and procedural nuances in the case -- the alleged lateness of Harbison's motion and the State's claim of laches; the absence of a transcript of McMurray's closing argument and the State's corresponding claim of procedural default; the want of an evidentiary hearing in the Superior Court; the lack of findings of fact by the lower court; Harbison's reliance on only his verified pleading and Fuller's answers to interrogatories; and the Bar proceeding and the divided panel's determination.

In answer to some of the peculiar procedural and factual problems raised by the State, the Court invoked its special discretionary powers to reach the merits. Id. at 178, at 506 (Pet. App. A3-A4).

ARGUMENT

I

To the Supreme Court of North Carolina, the prejudice in this case was obvious. Respondent was denied the experience of a true adversarial trial and the right to

insist that the prosecution prove its case without the benefit of a concession of guilt to any offense charged in the bill of indictment.

In so concluding, the Supreme Court of North Carolina conducted a straightforward application of the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). It awarded a new trial because McMurray's action transformed Harbison's trial into something less than the true adversarial proceeding contemplated by the constitution.

The operative principle that has animated this Court's Sixth Amendment analysis was stated succinctly by Justice Stevens in Cronic:

> When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

466 U.S. at 656-57 (footnotes omitted). The Supreme Court of North Carolina identified several essential attributes of a true adversarial proceeding that were missing from Harbison's trial.

A

Indispensable to a true adversarial criminal trial is loyal advocacy -- however effective -- and it was unmistakably absent at a critical point in Harbison's trial. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685.

No matter how skillful or competent, a lawyer by definition must remain the client's representative and must stand as a loyal advocate of the accused's cause and not his own. After all, the accused and not the lawyer is the party to the proceeding:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause.

Id. at 685. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" Cronic, 466 U.S. at 656 (quoting Anders v. California, 386 U.S. 738, 743 (1967)). See also Nix v. Whiteside, 54 U.S.L.W. 4194, 4196 (U.S. Feb. 26, 1986)(No. 84-1321); Cuyler v. Sullivan, 446 U.S. 335 (1980); Gedders v. United States, 425 U.S. 80 (1976).

McMurray abandoned the role of advocate and became an active and vocal adversary of Harbison's own expressed wishes and interests. To the jury, and certainly to Harbison, there arose a profound conflict of interest between client and counsel. Harbison wanted an acquittal and McMurray was asking for a conviction on a lesser offense. The scene does not resemble the true adversarial proceeding the constitution demands. An adversary was seated in the chair reserved for the loyal advocate.

B

Another sine qua non of a true adversarial proceeding is the requirement, under In re Winship and Mullaney v.

Wilbur, that the State be held to its burden of proof beyond reasonable doubt:

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656 n.19 (citations omitted)(emphasis supplied). See also Strickland, 466 U.S. at 685 ("a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding").

That fundamental attribute likewise was missing from Harbison's trial. The Supreme Court of North Carolina examined the record before it and found that McMurray's argument had an effect tantamount to the entry of a plea of guilty without Harbison's consent. 315 N.C. at 180, 337 S.E.2d at 507 (Pet. App. A6). To the Court, there appeared a reasonable probability that Harbison's issues were not resolved by an impartial jury's application of the law to the evidence. Although the jury was instructed on the law of self-defense, the Court saw no legitimate reason to believe that the jury gave self-defense an unbiased consideration in the wake of McMurray's unauthorized concession of Harbison's guilt. Although the trial court instructed the jury on the presumption of innocence and the State's burden of proof, the Supreme Court similarly saw no legitimate reason to believe that the jury fairly considered Harbison's possible innocence.

Far from ignoring the question of prejudice, the Supreme Court found it and identified it. That finding should be accorded respect consistent with the principles of federalism embodied in 28 U.S.C. 2254.[6] See Strickland, 466 U.S. at 698; see also Cabana v. Bullock, 38 Cr. L. Rptr. 3093 (U.S. Jan. 22, 1986)(No. 84-1236).

Given that finding, the Court's decision this Term in Hill v. Lockhart, 54 U.S.L.W. 4006 (U.S. Nov. 18, 1985)(No. 84-1103), proves strikingly similar to the decision below. In Hill, the principles articulated in Strickland and Cronic were applied to challenges to guilty pleas based on ineffective assistance of counsel. Speaking particularly to the second, or "prejudice," requirement of Strickland, Justice Rehnquist concluded for the majority that:

> [I]n order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

54 U.S.L.W. at 4008 (emphasis supplied)(footnote omitted).

The Supreme Court of North Carolina's decision in this case rests comfortably within Hill's ambit. The record shows beyond any doubt that Harbison insisted on pleading not guilty and insisted on going to trial. What Harbison received as a consequence of McMurray's unauthorized plea on his behalf, however, was only the hollow shell of a trial --

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[6]It is worthy of mention that the Supreme Court of North Carolina apparently believed that the effect of McMurray's argument also contravened State law principles governing an accused's rights relative to the plea. The Court pointed to the seminal North Carolina authorities on that issue -- N.C.G.S. 15A-1011 through 15A-1026 and State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

a proceeding where the impartial jury determination of guilty or not guilty in accordance with Mullaney v. Wilbur which Harbison sought was effectively foreclosed.

C

The Supreme Court of North Carolina also discerned yet another fundamental attribute of our criminal process that was absent from Harbison's case. As this Court's opinions teach, our constitution commands a very limited but absolutely indispensable respect for an accused's autonomy as a competent human being. That immutable respect was denied to Harbison.

Concern for essential human dignity has independent force within the Anglo-American system of criminal justice. It is a virtue that contributes to the legitimacy and integrity of our adversarial process. The constitution reserves certain core decisions to citizens and those decisions must be upheld strictly and without equivocation even when they are demonstrably unwise. While there is much to be said, for instance, in support of the adage that the litigator who represents himself has a fool for a client, it is fairly settled that a per se constitutional violation, without a need to show particular prejudice, is demonstrated where a defendant is deprived of the right of self-representation under Faretta v. California, 422 U.S. 806 (1975). "The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defence,' implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial." McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(emphasis in original). As evidenced by the Court's decision this Term in Hill v. Lockhart, a functionally

similar respect is accorded the plea decision reserved to an accused under Boykin v. Alabama, 395 U.S. 238 (1969); an involuntary plea -- however wise it might truly have been -- must be set aside if the accused would not have tendered it but for the ineffective counsel of a lawyer. See also Brookhart v. Janis, 384 U.S. 1 (1966)(counsel cannot override client's plea of not guilty by proffering functional equivalent of a plea of guilty).

Whatever autonomy the constitution guarantees to Harbison was usurped. His unequivocal plea, defense, and claim of innocence were overruled by the unsolicited fiat of his attorney. Had the true adversarial process contemplated by the constitution been at work, Harbison's expressed wishes in what, after all, was his case would have been accorded more respect.

II

To properly test Petitioner's argument, it is perhaps best to articulate two fundamentally different scenarios that Petitioner does not distinguish.

The first involves a lawyer who, without any notice to or any implicit or explicit consent from his client, concedes his client's guilt to an offense when his client steadfastly has denied any and all culpability. The second involves a lawyer who advises his client to permit a concession of some culpability in the hope of limiting the potential damage, who obtains the client's consent, and who then carries out the client's informed wishes. The former features fundamental departures from the adversarial process we expect. It is, of course, Harbison's case. The latter shows a lawyer seeking to effectuate his client's interests

within the adversarial process. It is the case that Petitioner seeks to litigate.

Petitioner's discussion of Strickland's "prejudice" requirement is premised upon the assumption that a lawyer possesses the discretion and legitimate authority to plead his client guilty to a charge even against his client's expressed wishes. That central premise is proffered rhetorically by Petitioner's consistent references to McMurray's decision to admit his client's guilt as "tactical" or "strategic." In this area of the law, such labels connote particular lines of thinking and trigger the application of particular legal doctrines. And indeed, the "tactical" label contributes precisely that disservice in Petitioner's argument.

Under Strickland and Cronic -- as well as in North Carolina under State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985) -- it is widely understood that lawyers enjoy considerable latitude over "tactical" matters without regard to their clients' wishes or demands. Within the "tactical" zone, only seriously egregious errors in judgment will constitute, in the first instance, ineffectiveness. And because "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial," Strickland, 466 U.S. at 693, the defendant generally should be required to prove a particular prejudice linked to the outcome of the case. So runs Petitioner's argument here.

Petitioner's argument would seem better advanced in a case where the premise fits the facts -- namely, a case in which the lawyer ineffectively advises his client to confess his guilt to a lesser offense at the conclusion of the evidence and the client consents to counsel's suggestion.

In those circumstances, the probable impact on the jury's deliberations might become the exclusive concern because the adversarial process has not been fundamentally altered. The question Petitioner presents here really might be raised in such a case.[7] But that is another case. McMurray ventured into an area where he possessed no power and no discretion. When McMurray embarked as he did, he transformed the nature of the proceedings. Petitioner's argument fails to account satisfactorily for these facts.

III

The Supreme Court of North Carolina in fact was not the first appellate court to hold, post-Strickland, that per se ineffective assistance of counsel is established when a lawyer, by way of argument to the jury, concedes his client's guilt in a manner at odds with the defendant's earlier plea of not guilty and without the client's consent. One month before Harbison's case was decided, the Supreme Court of Illinois so held in People v. Hattery, ___ Ill.2d ___, 488 N.E.2d 513 (1985), vacating a death penalty case on direct appeal.

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[7]Petitioner's Question Presented is "Whether a tactical decision made by counsel for a criminal defendant to admit, during jury argument, his client's guilt of a lesser-included offense but seek acquittal of the offense charged, constitutes a per se violation of the defendant's Sixth Amendment right to the effective assistance of counsel?"

The Illinois Court followed two federal decisions handed down before Strickland[8] and assessed the legal climate as follows:

> In similar cases, courts have held that the admission of an accused's guilt by his defense attorney violates the defendant's sixth amendment right to the effective assistance of counsel. See Mullins v. Evans (10th Cir. 1980), 622 F.2d 505; State v. Wiplinger (Minn. 1984), 343 N.W.2d 858; People v. Fisher (1982), 119 Mich. App. 445, 326 N.W.2d 537; People v. Schultz (1978), 85 Mich. App. 527, 271 N.W.2d 305; People v. Carter (1976), 41 Ill. App. 3d 425, 354 N.E.2d 482. Cf. People v. Redmond (1972), 50 Ill.2d 313, 278 N.E.2d 766 (defense counsel's closing argument in which he admitted defendant's guilt constituted denial of due process).
>
> After considering the actions of the defense counsel in the present case we are convinced that the prosecution's case was not subjected to the "meaningful adversarial testing" required by the sixth amendment. (United States v. Cronic (1984), 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 65, 666.)

Id. at ___, at 518.

Finding substantial support, as did its counterpart in North Carolina, the Illinois Supreme Court went on to reject the notion that a lawyer possesses the "tactical" or "strategic" discretion to stand in opposition to his client's plea of not guilty:

> The State argues that defense counsel's actions were sound strategic decisions because the

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[8]See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 1776 (1985); Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981).

> evidence of defendant's guilt was overwhelming. We disagree. Although counsel's strategy may have been reasonable in light of the evidence -- a point we need not consider -- it was an impermissible one. . . . Counsel may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy.

Id. at ___, at 519.[9]

Finally, the Illinois Court likewise recognized the prejudice that necessarily follows when a lawyer abandons his client's informed wishes concerning a plea of not guilty. The Court could not square the adverse implications that such action poses under Winship and Mullaney with the clear admonition in Cronic that "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy

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[9]The Illinois Supreme Court could have drawn support from other decisions that have found it fundamentally wrong for a lawyer to concede a client's guilt against the client's expressed wishes. See King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2020 (1985); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Commonwealth v. Lane, 382 A.2d 460 (Pa. 1978).

burden of proof beyond reasonable doubt." Id. at ___, at 519.[10]

IV

Important policy considerations have been cited in support of the principles enunciated in Strickland and Cronic. Petitioner believes they have been undermined by the Supreme Court of North Carolina, summarizing its concerns as follows:

> If the North Carolina Supreme Court's decision remains uncorrected any attorney error may now be fair game for inclusion in the limited category of per se violations as the lower courts use the Sixth Amendment to second-guess, on a case by case basis, those tactical decisions of defense counsel which appear unwise, regardless of whether the defendant

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[10] A strict adherance to the dictates of Winship and Mullaney is essential to the true adversarial process our constitution requires. Both United States v. Cronic, 466 U.S. 648 (1984) and Hill v. Lockhart, 54 U.S.L.W. 4006 (U.S. Nov. 18, 1985)(No. 84-1103), so attest; Winship's progeny -- and particularly Connecticut v. Johnson, 460 U.S. 73 (1983) -- are firm on the issue.

There have been some abberant decisions in the lower appellate courts, e.g. United States v. Leifried, 732 F.2d 388 (4th Cir. 1984); McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984), and they should be attributed to a failure to appreciate the deleterious implications that an unauthorized concession of guilt to any offense poses under Winship and Mullaney.

Even so, the conflict among the lower courts alleged by Petitioner seems more apparent than real. Respondent's research has revealed no appellate decision reached after the opinions were handed down in Cronic and Strickland v. Washington, 466 U.S. 668 (1984), that stands in conflict with the decision of the Supreme Court of North Carolina. The cases cited by Petitioner to show a supposed conflict are, with the exception of King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 2020 (1985), earlier cases. See Pet. at 14 n. 8, 17-18. The Eleventh Circuit granted habeas corpus relief in King on the basis of ineffective assistance and the case does not appear to present a true conflict in principle.

> was actually prejudiced. Such a [illegible] burden on the trial courts and the State since defense counsel are in sole control of the creation or prevention of such errors.

(Pet. at 15)

The Supreme Court of North Carolina did not characterize its action as "second-guessing." Like the Illinois Supreme Court in Hattery, the North Carolina Court held that a lawyer has no power to do without his client's consent what McMurray did in this case. No reasons or thought processes are "second-guessed" because they are simply irrelevant.

Nor does the Supreme Court of North Carolina's holding create an "intolerable burden" for its lower trial courts and the finality of their judgments. The holding is clear and easily followed. When applied to grant relief, it will be applied only because a defendant's plea of not guilty has been overruled by a lawyer who is unwilling to respect his client's constitutional right to elect a full adversarial trial on the merits and advocate accordingly.

Petitioner is correct, however, in noting that the prosecution is not perfectly positioned to prevent a lawyer from acting as McMurray did. But the existence of stern disciplinary rules should deter the responsible members of the profession from taking unlawful and unethical actions. In that vein, it is essential to reiterate one of the few things Petitioner neglects to mention about the North Carolina State Bar proceedings lodged against McMurray. The Bar panel unanimously held that it is a violation of the State's standards of professional conduct for a lawyer to

admit a client's guilt to any offense to a jury without the client's consent.[11] (Pet. App. A127-A128)

North Carolina lawyers will be deterred and the State's interest in the finality of its valid and fair criminal convictions will be satisfied.

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[11]The Supreme Court of North Carolina did not resort in its opinion to any canons of ethics or standards of professional conduct. The case thus does not call into question the weight that such precepts should be given in Sixth Amendment cases. Cf. Nix v. Whiteside, 54 U.S.L.W. 4194, 4196 (U.S. Feb. 26, 1986)(No. 84-5786)(reserving the question for a future case).

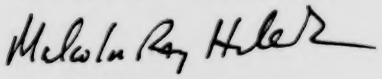
Ethical and professional norms of course were relevant to the North Carolina State Bar. The Bar panel relied upon Disciplinary Rule 7-101(A)(1) of North Carolina's Code of Professional Responsibility and Ethical Considerations 7-7 and 7-8 under the code. The disciplinary rule requires that a lawyer employ every reasonable means -- including reliance upon the presumption of innocence and the assertion of any reasonably available defense -- to achieve a client's lawful objectives. The ethical considerations, read together, make clear that it is for the client alone to decide what plea should be entered and whether an affirmative defense will be waived.

The Bar panel could have found additional support from the American Bar Association. Standard 4-5.2 of the Association's Standards for Criminal Justice (2nd ed. 1980) provides that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused . . . [including] (i) what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in his or her own behalf." The Association's Commentary to Standard 4-5.2 pointedly notes that "in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



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